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In The

Supreme Court of the United States

October Term, 1997

GEORGE NEWMAN,

Petitioner,

v.

CONSOLIDATION COAL COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Jones Act seaman entitled, under the Seventh Amendment and the Savings to Suitors Clause, to litigate shipowner negligence before a state court jury and to have that verdict binding in subsequent federal proceedings under the Limitation of Liability Act?

2. In these circumstances, may a claimant's right to proceed in state court be conditioned on a stipulation that the state proceedings will have no res judicata effect on the question of shipowner negligence?

LIST OF PARTIES

The parties to this case below are as reflected in its caption. In proceedings below, this matter was captioned as is customary for limitation proceedings. Originally, the Petitioner's wife, Suzanne Newman, was a plaintiff. Her claims were subsequently withdrawn.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, George Newman, respectfully prays that a writ of certiorari issue to review the August 18, 1997, judgment and opinion of the United States Court of Appeals for the Third Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Third Circuit of August 18, 1997, *Complaint of Consolidation Coal Co.*, No. 96-3434 (3d Cir. Aug. 18, 1997), is reported at 123 F.3d 126 (3d Cir. 1997), and is reprinted in the appendix hereto, at App. 1a. A Petition for Rehearing with a Suggestion for Rehearing In Banc was denied by the Third Circuit on October 30, 1997. App. 23a.

The order and findings of the U.S. District Court for the Western District of Pennsylvania, Judge Bloch, presiding, of July 17, 1996, were not reported. App. 25a, 26a. Likewise, the district court's order of August 4, 1995, was unreported. App. 34a.

In earlier proceedings, the Third Circuit denied Newman's appeal and application for a writ of mandamus on November 29, 1995, and this Court denied review of that decision on April 1, 1996. See 116 S.Ct. 1370 (1996).

In the parallel state proceedings, Newman was awarded a jury verdict on November 29, 1991, in the Court of Common Pleas of Allegheny County, Pennsylvania. App. 43a. The verdict was sustained by Pennsylvania's higher courts, 438 Pa. Super. 703, 652 A.2d 415 (1994); 540 Pa.

641, 659 A.2d 560 (1995). Review of these decisions was denied by this Court on October 10, 1995. 116 S.Ct. 331 (1995).

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Third Circuit of August 18, 1997. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on October 30, 1997. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL CLAUSE AND STATUTES INVOLVED

The Seventh Amendment to the U.S. Constitution provides that "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 1333(1) provides that "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ." This is often referred to as the "savings to suitors" clause, and is derived from section 9 of the First Judiciary Act, 1 Stat. 76-77 (1789).

The Limitation of Vessel Owner's Liability Act is

codified at 46 U.S.C. App. §§ 181-189. The essential provisions of the Act, for purposes of this Petition, are as follows:

> The liability of the owner of any vessel. . . for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of the such owner or owners, shall not. . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id. § 183(a). Moreover,

> the vessel owner. . . may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter. . . . Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Id. § 185.

The Jones Act is codified at 46 U.S.C. App. § 688. It provides in pertinent part, that "Any seaman who shall suffer personal injury in the course of employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such actions all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." The reference to railway workers legislation includes 45 U.S.C. §§ 51 (granting a right of action to such workers) and 56 (permitting concurrent jurisdiction of state and federal courts in such cases). In addition, 28 U.S.C. § 1445(a) prohibits removal of such cases.

STATEMENT

After many procedural steps, this case is finally in a correct posture for review of what the court below acknowledged were "complicated and unusual issues of admiralty procedure." App. 2a; 123 F.3d at 129. Despite the complex procedural history, at issue here is the basic allocation of authority between state and federal courts in deciding personal injury claims arising under maritime law.

1. On April 27, 1989, your Petitioner, George Newman, was employed as a deckhand on one of Consolidation Coal Company's ("Consol") tugs, The M/V ELIZABETH. Newman was involved that day in moving an empty barge from Consol's repair yard on the Monongahela River. Part of the operation included tying-up the barge with a rope, or leaving line. All parties agree that Newman fell into the bottom of the barge, suffering severe injuries. He has consistently maintained that the leaving line was worn or frayed and that it snapped, causing him to fall backwards. Consol has asserted that Newman simply slipped and fell, and that the leaving line was not cut or otherwise damaged prior to the accident. App. 4a-5a; 123 F.3d at 130-31.

2. a. Newman brought suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania, asserting claims of unseaworthiness and negligence under the Jones Act, 46 U.S.C. App. § 688. The Jones Act guarantees a jury trial, permits filings in state court, id., and prevents removal of such actions to federal court. 28 U.S.C. § 1445(a). Newman alleged in his state complaint that (1) Consol was negligent in failing to provide a proper leaving line, failing to properly inspect it, and failing to warn him regarding its condition, and (2) Consol had maintained its

vessel in an unseaworthy condition because the leaving line was not fit for its intended use.

On July 20, 1990, Consol petitioned the federal district court, invoking admiralty jurisdiction under 28 U.S.C. § 1333, and seeking exoneration from or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. §§ 181-189. Consol alleged in its petition that the tug and barge had a total value of $120,000, far less than the amount claimed by Newman for his injuries. Pursuant to the Limitation Act, id. § 185; Fed. R. Civ. P. Adm. Supp. F(3), the district court, Judge Alan N. Bloch, presiding, enjoined the state proceedings.

Because there was only a single claim arising from this incident, Newman sought to dissolve the stay under the authority of this Court's decisions in *Ex Parte Green*, 286 U.S. 437 (1932), and *Langnes v. Green*, 282 U.S. 531 (1931), and to litigate the negligence issues in state court. Newman proffered the standard stipulation that any jury verdict procured from state court could not affect Consol's right to litigate the question of whether (and to what extent) its liability could be limited. The district court demanded, however, additional stipulations:

> (1) that claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding; [and]
>
> (2) that [Consol] shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding. . . .

App. 45a. Newman chose not to take a permissive interlocutory appeal from the district court's order lifting the stay on state proceedings.

b. The case was thus tried in state court and was submitted to a jury on November 25, 1991. By special interrogatories, the jury found that Consol had been negligent under the Jones Act and that the negligence had caused Newman's injuries. The jury also found that the tug and barge upon which Newman had served had been unseaworthy, insofar as the leaving line had been frayed or damaged prior to the accident. Finally, the jury found that Newman's conduct partially contributed to his injuries, but returned a verdict in Newman's favor in the amount of $1,327,000. App. 43a.[1]

c. As per the stipulations entered on January 28, 1991, the matter was returned to federal court for the limitation proceeding. In a hearing on July 31, 1995, Consol sought to try afresh the issues of negligence and unseaworthiness, previously decided by the state jury verdict. Newman objected, arguing that the stipulation could only properly cover the reservation of limitation questions, but even if it were extended to exoneration, such did not permit the re-opening of the question of negligence under the Jones Act. Newman moved for the district court to adopt the findings of the state jury. App. 38a.

The district court denied that motion in an Order of August 4, 1995. App. 34a. Relying on Third Circuit authority, the district court noted that "'the claimant stipulates that the [district] court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under

[1] That verdict was later molded by the state trial court to $1,244,519.50. App. 3 n.1; 123 F.3d at 130 n.1. Post-trial motions and cross-appeals did not otherwise disturb the verdict. 438 Pa. Super. 703, 652 A.2d 415 (1994), aff'd, 540 Pa. 641, 659 A.2d 560 (1995), cert. denied, 116 S.Ct. 331 (1995).

the Act.'" App. 35a (quoting *Gorman v. Cerasia*, 2 F.3d 519, 524 (3d Cir. 1993)). The district court extended this language to *all* issues implicated in the case, including the underlying question of Consol's negligence under the Jones Act, 46 U.S.C. § 688. App. 35a-36a. The district court rejected Newman's constitutional argument based on the Seventh Amendment and the language of the Jones Act.

Newman sought to appeal that Order and also secure a writ of mandamus from the Third Circuit to compel the district court to adopt the state jury's findings. The Third Circuit denied the appeal (as not being from a final judgment) and the mandamus application on November 29, 1995. App. 4a; 123 F.3d at 130. This Court denied review of that decision on April 1, 1996. See 116 S.Ct. 1370 (1996).

3. a. On July 8, 1996, the district court conducted a bench trial on Consol's claim to exonerate itself from responsibility for Newman's injury or, in the alternative, to limit its liability. In an Order, Findings of Fact and Conclusions of Law issued on July 17, 1996, the district court found that Consol was entirely free from fault and that Newman had failed to prove that Consol was liable under either the Jones Act negligence or unseaworthiness grounds. App. 33a. This finding was, obviously, contrary to the earlier state jury verdict.

b. Having now a final judgment, Newman appealed to the Third Circuit. The appeal questioned the district court's refusal to give binding effect to the state court findings on negligence and unseaworthiness. In addition, the Third Circuit addressed the district court's factual findings and evidentiary rulings leading to its conclusion that Consol was utterly without fault for Newman's accident. This cluster of factual issues, although dividing the court below (see App. 18a-22a; 123 F.3d at 137-40 (McKee, J., dissenting)), are not

the subject of this Petition.

i. In its discussion of "whether a shipowner has the right to litigate the issue of exoneration [as distinct from limitation] in federal court without regard to the findings of the state court," the Third Circuit observed that there was a split among the circuits. App. 9a; 123 F.3d at 133. The Seventh Circuit explicitly held in *Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821, 828 (7th Cir.), cert. denied, 117 S.Ct. 361 (1996), that a state court's findings on shipowner negligence must be respected by the federal court. But, as the court below noted, App. 9a; 123 F.3d at 133, *McCarthy Bros.* is at odds with Fifth Circuit precedent, including *Texaco v. Williams*, 47 F.3d 765, 769 (5th Cir.), cert. denied, 116 S.Ct. 275 (1995), and *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993), cert. denied, 511 U.S. 104 (1994).

The court below notionally refused to take sides in this doctrinal split of whether, under the Seventh Amendment, Jones Act, and the "savings to suitors" clause of 28 U.S.C. § 1333, district courts can (as a condition for allowing state court proceedings) require that the claimant waive res judicata effect as to findings on shipowner negligence. And although the Third Circuit expressed "serious doubts" as to whether a claimant was required to make such a stipulation, App. 10a; 123 F.3d at 134, it nevertheless fashioned a rule which aligned its position with that of the Fifth Circuit in granting district courts unfettered power to demand such stipulations. The court of appeals held that because Newman failed to take an interlocutory appeal under 28 U.S.C. § 1292(a)(1), "Newman has not preserved his right to raise the issue." Id. at 9a; 123 F.3d at 133.

ii. The Third Circuit went on to consider whether, "even if retrial on the exoneration issue [before the

federal court] was appropriate, it should have been before a jury." Id. at 10a; 123 F.3d at 134. The court conceded that had Newman brought his Jones Act claims in federal court, he would have been entitled to a jury verdict on the negligence and unseaworthiness issues, although the remaining issue of Consol's entitlement to limitation would have been tried to the bench. But, the Third Circuit reasoned, because Newman had elected under the Jones Act and the savings to suitors clause to bring his claims in state court, the district court could require him to stipulate away the res judicata effect of a state jury verdict. Id. at 11a; 123 F.3d at 134 ("In trying the admiralty action, the district court independently considered issues decided by the state court jury, but reached a different result. Yet the inconsistency was entirely appropriate because Newman waived any claim to res judicata based on the state court proceeding with respect to exoneration.").

Rather curiously, the court of appeals also noted that the state court proceedings were not a "complete nullity," because the "district court did adopt the jury's findings on damages because the damages issue was not covered by Newman's waiver of res judicata." Id. at 12a; 123 F.3d at 135. Of course, the district court in no sense adopted the state jury's damage findings; it found that Consol was not liable and owed no damages to Newman.

c. Newman sought a Petition for Rehearing and Suggestion for Rehearing In Banc, which was denied on October 30, 1997. App. 23a. This timely Petition follows.

REASONS FOR GRANTING THE PETITION

IN SINGLE-CLAIM LIMITATION PROCEEDINGS, FEDERAL COURTS MUST RESPECT STATE JURY VERDICTS ON SHIPOWNER NEGLIGENCE AND CANNOT CONDITION ACCESS TO STATE COURTS ON STIPULATIONS NEGATING THE EFFECT OF THOSE FINDINGS

This Petition calls upon the Court to reconcile a fundamental conflict, affecting many aspects of maritime law practice, regarding the allocation of authority between state and federal courts. On the one side is a plaintiff's right to seek effective common law remedies before a state jury, a privilege conferred by the Seventh Amendment, the "savings to suitors" clause of 28 U.S.C. §1333(1), and (in this particular case) the express statutory language of the Jones Act, 46 U.S.C. App. § 688. On the other side is a shipowner's option to seek limitation of liability in federal court proceedings, 46 U.S.C. App. § 185.

This clash has been characterized as "recurring and inherent," *Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina, B.V.*, 836 F.2d 750, 754 (2d Cir. 1988), and "significant." *Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821, 826 (7th Cir. 1996), cert. denied, 117 S.Ct. 361 (1996). Supreme Court review is required to resolve a growing divergence in practice among the lower courts. If left uncorrected, federal courts will, in a large group of maritime cases, arrogate decision-making authority which has been allocated (by the Constitution and by statute) to state courts.

1. This Court -- as the ultimate guardian of a

uniform, national maritime law -- has set the conditions in which admiralty plaintiffs may seek remedies in state court, so long as the ultimate disposition of the shipowner's entitlement to, and extent of, limitation of liability is preserved to the federal courts. There are two situations in which a district court must lift the stay on parallel state proceedings, enjoined by shipowner under 46 U.S.C. App. § 185 and Fed. R. Civ. P. Adm. Supp. F(3). The first is where the value of the vessel and freight exceeds that of all claims. In such situations, there is no risk that the shipowner's right to limit its liability will be threatened by state court proceedings. See *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152 (1957).

The second circumstance, and the one presented here, is where there is only a single claim arising from a particular incident. In its seminal decisions of *Ex Parte Green*, 286 U.S. 437 (1932), and *Langnes v. Green*, 282 U.S. 531 (1931), this Court emphasized that the Limitation Act's conferral of exclusive jurisdiction on the federal courts had to be harmonized with the savings to suitors clause of 28 U.S.C. § 1333(1) (granting district courts exclusive admiralty jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ."). In *Langnes*, it was held that the district court

> should have granted [the claimant's] motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but . . . the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court. . . . The failure to do this, in our

> opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court.

282 U.S. at 541-42. *Langnes* is thus, at its essence, a doctrine of abstention. Federal courts must defer the consideration of the shipowner's petition to limit liability and await the result of state proceedings on the underlying question of the shipowner's actual liability.

The conditions under which plaintiffs can proceed in state court is a matter vested in the "sound discretion" of district courts. Id. at 541. But, as noted in *Langnes*, there are limits on this exercise of discretion, limits that must be observed, lest federal courts exceed the statutory and constitutional boundaries of their jurisdiction in maritime cases. See also *Complaint of Helena Marine Service, Inc.*, 564 F.2d 15, 18 (8th Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

2. This Petition questions the effective limits of the "exercise of sound discretion" by district courts in single-claim limitation proceedings involving common law claims which have been "saved to suitors." In this case, the district court, with the concurrence of the Third Circuit, conditioned Newman's right to litigate Consol's negligence in state court on a stipulation that was later interpreted to mean that the state proceedings had no binding effect in the litigation. The added stipulation "that [Consol] shall have the right to litigate all issues relating to its claims of limitation *and exoneration* of liability in the present proceeding. . . .," App. 46a (emphasis added), nullified the state jury's verdict under the Jones Act that Consol's negligence caused Newman's injuries and that the tug and barge upon which Newman worked was unseaworthy. Pet. App. 43a.

The Third Circuit held that the inclusion of the exoneration language in the stipulation meant that Consol was free to relitigate all issues concerning its liability before the district court, and that the federal court was at liberty to utterly ignore the state jury verdict. App. 8a-10a; 123 F.3d at 132-34.[2] This result is contrary to this Court's previous rulings, the manifest intent of the Limitation Act, Jones Act and savings to suitors clause, and also the weight of circuit authority (although, as the court below noted, App. 9a; 123 F.3d at 133, there is a split on this question).

a. In its decisions, this Court has consistently reaffirmed the narrow ambit of the Limitation Act:

> [f]or us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights. . . . The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and

[2] The rule adopted below means that a shipowner has two chances to prove it was not liable under the Jones Act, because it is the claimant that must stipulate against the res judicata effect of any judgment in state court, not the shipowner. Pet. App. 45a-46a. If a state court absolves a shipowner of liability, it is doubtful that a claimant will be permitted to relitigate that issue in any subsequent proceedings. But if (as here) a state jury finds that there was liability under the Jones Act, under the logic of the Third and Fifth Circuit's decisions, the shipowner may seek *de novo* consideration of that issue before the district court, in addition to the issue of whether the shipowner may limit liability.

above granting him limited liability. . . .

Lake Tankers, 354 U.S. at 152-53. Moreover, in *Langnes* it was expressly indicated that despite the invocation of the Limitation Act, a

> plaintiff had a right to pursue his remedy in the state court, unless the act providing for a limitation of liability clearly deprived him of it; . . . where there was only a single claim, there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court. . . .

Langnes, 282 U.S. at 542 (discussing *The LOTTA*, 150 F. 219 (D.S.C. 1907)).

When the question of the balance of authority between state and federal courts in limitation proceedings again arose in that same case, this Court made clear that "the state court had no jurisdiction to determine the question of the owner's *right to a limited liability*. . . ." *Ex parte Green*, 286 U.S. at 439-40 (emphasis added). But clearly this Court believed that the federal court must defer to state proceedings which determine the shipowner's underlying liability, so long as those verdicts do not prejudge whether, and to what extent, the shipowner may limit liability. See id. at 440 ("Green, following the remission of the cause to the state court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the federal District Court. . . .").

b. These observations are completely consistent with the Limitation Act itself, as well as the grant of state court jurisdiction over maritime cases reserved in the savings to suitors clause and the Jones Act. The Limitation Act does

not provide for exoneration. The right of a shipowner to seek, in federal proceedings, exoneration from liability (as distinct from limitation of liability), is a product of this Court's decisions, see e.g., *The BENEFACTOR*, 103 U.S. 239 (1880), and Court rule. See Fed. R. Civ. R. Adm. Supp. F(2) ("The complaint may demand exoneration from as well as limitation of liability.").

The right to exoneration was intended to facilitate resolution of cases where all claims raised against the shipowner fell within the exclusive federal admiralty jurisdiction. But it has no application in proceedings brought in state court, seeking common law remedies, under the "savings to suitors" clause of 28 U.S.C. § 1333(1). Section 1333 has long been recognized as meaning that "in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away. The saving is for the benefit of suitors . . . so giving to himself and the defendant all the advantages which such [common law] tribunals can give to suitors in them." *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). This is such a case of concurrent jurisdiction. State courts will decide the common law claim of negligence, and, if liability is found, the federal court will then decide the shipowner's right to limit liability. But the federal court may not substitute its judgment for that of the state jury on the question of shipowner negligence.

In cases brought under the savings to suitors clause, plaintiffs may elect common law remedies and seek a jury verdict before a state court. In order for this right to mean anything, the suitor's election of a state forum must be protected from potential removal by the defendant, *see Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959), and in bifurcated proceedings (such as this one) the state determination is binding on those issues

which are not within the exclusive admiralty jurisdiction of the federal courts. By permitting the district court to condition access to state court on a stipulation regarding exoneration -- negating any real res judicata or issue preclusion effect for that jury verdict -- the Third Circuit nullified the savings to suitors clause which is an essential qualification of section 1333's grant of exclusive admiralty jurisdiction to the federal courts. This is manifestly contrary to the Seventh Amendment admonition that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Lastly, the Jones Act specifically guarantees a seaman's right to bring claims for negligence and unseaworthiness before a state jury. See 46 U.S.C. App. § 688, referencing 45 U.S.C. § 56. Indeed the language of the Jones Act tracks the savings to suitors clause insofar as it recognizes "the right to trial by jury" and preserves "in such actions all statutes of the United States modifying or extending the common law right or remedy . . . ." Id. Of course, not all maritime claims saved to suitors under 28 U.S.C. § 1333(1) are brought by Jones Act seamen. Not only does the additional statutory authority of the Jones Act render the Third Circuit's opinion suspect, the logic adopted below could displace many sorts of maritime claims saved to suitors and result in an arrogation of federal jurisdiction at the expense of state courts.

c. The court of appeals recognized that there was a split in authority on the extent to which a district court could condition access to state proceedings on a stipulation waiving res judicata effect of findings bearing on exoneration or the actual liability of the shipowner. App. 9a; 123 F.3d at 133. If anything, the division is broader than the Third Circuit

realized.

The vast majority of circuits have ruled that district courts can only demand stipulations nullifying the res judicata effect[3] of state judgments bearing on the shipowner's right to limitation, but not as to exoneration from liability. The Second Circuit, in *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436 (2d Cir.), cert. denied, 331 U.S. 850 (1947) noted that shipowners were entitled not to have a "verdict for the plaintiff . . . be effective as an estoppel on the issue of their privity or knowledge," id. at 438, and thus their ability to limit liability. See also *Complaint of Dammers & Vanderheide & Scheepvaart Maats*, 836 F.2d 750, 758 (2d Cir. 1988). This approach has been adopted by the Sixth, Eighth, and Ninth Circuits. See *Great Lakes Dredge & Dock Co. v. Lynch*, 173 F.2d 281, 284 (6th Cir. 1949); *Complaint of Helena Marine Serv., Inc.*, 564 F.2d 15, 18 (8th Cir. 1977); *Port of Pasco v. Pacific Inland Nav. Co.*, 324 F.2d 593, 594 & n.4 (9th Cir. 1963).

But recently, the Fifth Circuit has allowed district courts to require plaintiffs to waive the res judicata effects of state verdicts on exoneration issues bearing on shipowner liability. See *Texaco v. Williams*, 47 F.3d 765, 769 (5th Cir.), cert. denied, 116 S.Ct. 275 (1995); *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993), cert. denied, 511 U.S. 104 (1994). It was to this development that the Seventh Circuit, in *Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821 (7th Cir. 1996), cert. denied, 117 S.Ct. 361 (1996), took exception. See id. at 831-32.

[3] In an earlier decision, the Third Circuit noted that "[i]t is clear that the relevant waiver discussed is that of issue preclusion, notwithstanding the reference in the cases to 'res judicata'." *Gorman v. Cerasia*, 2 F.3d 519, 528-29 (3d Cir. 1993).

3. There is substantial confusion among the lower courts as to what issues the state court may conclusively decide in these single-claim limitation cases. All authorities agree that a state court verdict cannot impinge on the federal court's ability to decide the shipowner's entitlement to limit liability and the valuation of the limitation fund. Petitioner certainly does not doubt that point. The issue here is whether a state jury's verdict on the question of shipowner negligence is to be respected. Simply because a shipowner has claimed exoneration from liability cannot oust the state courts of their constitutionally and statutorily granted role in the adjudication of shipowner liability in maritime cases.

Petitioner is mindful that there is an overlap of *some* negligence and limitation issues, as when the "factual questions raised in the limitation proceeding (whether the maritime mishap occurred "without the privity or knowledge" of the shipowner), and those to be litigated in the state tort action (whether the shipowner acted unreasonably)" may be congruent. *Gorman*, 2 F.3d at 528. But cf. *Star Brick Corp. v. Johnson*, 262 F.2d 251, 252 (2d Cir. 1959) ("Stipulations that the admiralty court has jurisdiction to determine the claim to limitation or exoneration and that the claimant waives any claim of res judicata on these issues from the state court judgment are necessary; but other provisions such as that the claimant will not offer evidence in the state court challenging the seaworthiness of the barge should be eliminated."). See also *Complaint of Great Lake Dredge & Dock Co.*, 162 F.R.D. 160, 164-65 (M.D. Fla. 1995) (refusing to follow *Gorman*, to the extent it allowed stipulation waiving res judicata effect as to exoneration).

But here the state jury found that Consol was negligent in causing Newman's injuries, and, additionally, that the barge upon which Newman worked was unseaworthy.

App. 43a. Petitioner agrees that the federal court is free to consider whether Consol had privity or knowledge of the conditions giving rise to the accident, as a threshold matter to determining whether Consol may limit its liability. What the district court could not do was to condition access to state proceedings on a stipulation that the entire thrust of such proceedings -- whether Consol was negligent under the Jones Act -- would be a nullity and irrelevant. At the conclusion of the state proceedings, the district court was obliged to adopt the state jury's findings of fact on negligence and unseaworthiness, but reserving to itself the power to determine whether Consol could limit its liability.

Any other result subverts the constitutional command in the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States," as well as the statutory directions of the savings to suitors clause and the Jones Act. If left unreviewed, the Third Circuit's decisions (here and in *Gorman*), in alliance with the Fifth Circuit jurisprudence, will unsettle the delicate balance between state and federal court authority in deciding common law remedies which have been "saved to suitors."

4. The Third Circuit observed that because Newman failed to take an interlocutory appeal, under 28 U.S.C. § 1292(a)(1), from the district court's order lifting the stay on state proceedings and imposing the disputed stipulations, he "has not preserved his right to raise the issue." App. 9a; 123 F.3d at 133. There are several reasons why this holding should not deter the Court from granting this Petition, if it is otherwise disposed to do so.

First, Petitioner entertains serious doubts whether the failure to take a *permissive* appeal under 1292(a) can bar his claims. Courts have been unanimous in holding that the failure to take an appeal as of right from an order concerning

an injunction, does not serve as a waiver of issues on appeal from final judgment. See *F.W. Kerr Chemical Co. v. Crandall Associate, Inc.*, 815 F.2d 426, 428 (6th Cir. 1987); *Tincher v. Piasecki*, 520 F.2d 851, 853 (7th Cir. 1975).[4] And this is for a very good reason. If the Third Circuit's reasoning were widely followed, litigants would feel obliged to appeal from all orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," 28 U.S.C. § 1292(a)(1), for fear of waiving their claims. "Protective appeals" and "piecemeal litigation" would abound. See *Exchange Nat'l Bank of Chicago v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985); *Hunter v. Dep't of Air Force Agency*, 846 F.2d 1314, 1316 (11th Cir. 1988). The Third Circuit has situationally converted permissive review into a mandatory appeal, and so required Newman to have been clairvoyant in predicting the district court's later interpretation of the stipulation.[5]

Second, after the state proceeding, Newman raised and

[4] The case law under § 1292(a)(3) for interlocutory admiralty appeals is just as emphatic in holding that such appeals are permissive and parties do not waive issues by deciding to wait for final judgments. See *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 591 (5th Cir. 1967); *Gloria Steamship Co. v. Smith*, 376 F.2d 46, 47 (5th Cir. 1967).

[5] Indeed, the holding below appears to conflict with the Third Circuit's own precedent. See *Ernst v. Child & Youth Servs. of Chester Co.*, 108 F.3d 486, 492-93 (3d Cir.), cert. denied, 118 S.Ct. 139 (1997) ("[W]e hold that an interlocutory appeal . . . although permitted, is not obligatory. . . . '[i]f matters are adjudged by an interlocutory decree that is subject to immediate appeal, and no appeal is taken, they are not foreclosed, but are subject to review on appeal from the final judgment.'" (quoting 9 MOORE'S FEDERAL PRACTICE § 110.18, at 194 (1996)); *Victor Talking Mach. Co. v. George*, 105 F.2d 697, 699 (3d Cir. 1939), cert. denied, 308 U.S. 611 (1939).

preserved his objection to the district court's failure to adopt the state jury's verdict on Consol's negligence. When the district court interpreted the earlier stipulation so as to refuse dispositive effect for the jury verdict, Newman sought to take an appeal. This was denied by the Third Circuit because the order being appealed was not a final judgment. App. 4a; 123 F.3d at 130. It would be inconsistent, to say the least, to deny Newman's objections because he failed to take a permissive appeal at the time the stipulation was imposed, even though he sought (unsuccessfully) to appeal the district court's refusal to adopt the verdict.

The essential question raised by this Petition -- whether, in a limitation proceeding, a federal court can refuse to adopt a state jury's verdict on shipowner negligence -- was thus adequately preserved. At stake here is the constitutional principle of respect for jury verdicts, as well as the key role that state courts play in the resolution of maritime claims. This significant, recurring and inherent issue in admiralty practice deserves this Court's review.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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January 1998

Filed August 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3434

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability

GEORGE NEWMAN,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 90-01206)

Argued June 27, 1997

BEFORE: GREENBERG and MCKEE, *Circuit Judges*, and GREENAWAY,* *District Judge*

(Filed: August 18, 1997)

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Attorney for Appellant

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*Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

This case is before this court on appeal from the district court's order exonerating the Consolidation Coal Co. ("Consol") from liability for injuries to its employee George Newman. This appeal presents complicated and unusual issues of admiralty procedure. Consequently, we set forth the convoluted procedural and factual history of this case at considerable length.

I. CASE HISTORY

A. Procedural History

On April 27, 1989, Newman was injured while working as a deckhand for Consol. Thereafter, Newman and his wife filed suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania, asserting claims of unseaworthiness and negligence under the Jones Act, 46 App. U.S.C. § 688. Subsequently, on July 20, 1990, invoking jurisdiction under 28 U.S.C. § 1333, Consol filed suit in the district court pursuant to the Limitation of Liability Act ("Limitation Act"), 46 App. U.S.C. § 183, seeking exoneration from or limitation of any liability it may have had to the Newmans. As a matter of convenience, we will refer to Consol's case simply as the "limitation action." Pursuant to the Limitation Act, the district court enjoined the state court proceedings. *See* 46 App. U.S.C. § 185.

After filing his claim in the limitation action (in which he demanded a jury trial), Newman moved on January 18, 1991, to dissolve the stay of the state court proceedings.

The district court dissolved the injunction after Newman stipulated:

> 1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability in the present proceeding.
> . . .
>
> 3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania.
> . . .

App. at 132. At the same time, the district court administratively dismissed the limitation action subject to reopening after conclusion of the state court proceedings. Newman entered into this stipulation even though he could have rejected it. He instead could have appealed to this court from the denial of a motion to dissolve the injunction if the district court refused to dissolve the injunction without the stipulation. *See* 28 U.S.C. § 1292(a)(1).

The case then continued in the state court where in November 1991, Newman (his wife had withdrawn her claims) obtained a verdict finding Consol negligent and the vessel unseaworthy and setting Newman's damages at $1,327,000.[1] With the exception of an issue concerning interest, the Pennsylvania Superior Court affirmed the judgment of the common pleas court; it thus did not disturb any of the jury's factual findings. The Pennsylvania and United States Supreme Courts then respectively denied petitions for allocatur and certiorari.

On June 15, 1995, Newman moved to have the limitation action revived.[2] After the court restored the case, Newman

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1. The jury also found Newman 11.83% contributorily negligent. The state court molded the verdict to $1,244,519.50 after making certain adjustments we need not detail.

2. The evidence at the trial showed that the tug and barge had a total value of $120,000, far less than the damages Newman recovered in the state court.

filed a motion seeking to have the district court adopt the findings of the state jury, but the district court denied that motion. Newman then appealed that denial to this court and petitioned this court for a writ of mandamus to grant him similar relief. We, however, dismissed the appeal, which clearly was not from a final judgment, and denied the petition for a writ of mandamus. The district court thereafter adopted the jury's assessment of damages. Accordingly, the district court at a bench trial heard the limitation action *de novo* on liability as well as on certain admiralty issues, which we need not here set forth. The district court found in favor of Consol on liability, rendering the remaining issues moot.

B. Factual History

At the time of his injury, Consol employed Newman as a deckhand. On April 27, 1989, Newman was serving in that capacity on a tug, the M/V Elizabeth, with Timothy Stinson as the pilot. The Elizabeth was being used to move an empty barge, No. 1029, from Consol's repair yard, across the Monongahela river a couple of hundred yards to a fleet of empty barges.

Barge 1029 was about 175 feet long, 26 feet wide and 10 feet deep. Stinson and Newman were inserting Barge 1029 into a row of the empty fleet after removing another barge to the repair yard. Newman was using a rope, or leaving line, to tie Barge 1029 to the adjoining barge at the half-head. Newman already had attached the ends of the barges with wires. Stinson testified that he looked away briefly, and when he turned back, "Mr. Newman was going through the air backwards with a little bit of force . . . ." App. at 1224. Newman has no memory of the accident. Newman fell into the bottom of the barge, hitting his head and severely injuring himself. Stinson said he saw part of the line still attached to the half-head, and part down with Newman. Stinson untied the barge and took it back across to the repair facility to bring Newman to medical aid.

Newman was lifted out of the barge and set on the bank to await an ambulance. Michael Hughes, Consol's assistant operating manager in 1989, retrieved the piece of the line

from the bottom of the barge. Thomas Brown, the foreman at the repair facility, removed the piece of line with the eye from the half-head. Hughes then took possession of the whole line, put it in his office, and later bagged and labeled it. The line was taken to the Pittsburgh Testing Laboratory for analysis by Clarence Clegg. Warren Orr (the port captain), and Louis Truntich (assistant foreman) both testified that they observed the line after the accident and thought it had been cut. Brown stated that the line did not look freshly cut but instead was old and worn. Clegg, Consol's expert witness, testified that the rope had been cut with a sharp instrument, except for a few strands on the outside which could have broken under tension. All the Consol employees who testified stated that the standard practice was for the person using a line to inspect it and replace it if worn out, although Consol did not have a written policy to this effect. New leaving line was available for deckhands needing to replace old line.

On July 18, 1996, the district court entered its decision and order exonerating Consol from liability, finding that there was neither unseaworthiness nor negligence. The court found as a fact that Newman slipped and fell, and that the line was cut through entirely after the accident. This result obviated the need for the district court to decide the limitation of liability issues. Newman then appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

On appeal Newman argues that the district court improperly forced him to stipulate that he would not claim any res judicata effect from the state court judgment; he also challenges as violative of the Seventh Amendment the denial of his motion to adopt the state jury findings. Newman also argues that the district court's factual findings on the exoneration issue were clearly erroneous. He further contends that the court's exclusion, as a subsequent remedial measure, of a Consol safety memo issued about Newman's accident was erroneous as was its denial of a motion he made to dismiss the limitation action by reason of the spoliation of evidence. He predicated the spoliation argument on the contention that if the line was cut after the accident Consol must have cut it.

II. DISCUSSION

A. Standard of Review

This appeal highlights two areas for review. The first arises from the legal consequences flowing from the circumstance that the accident led to both state and federal court proceedings. This area is essentially legal in character. The second area of inquiry focuses on the trial itself. We have plenary review over the district court's legal determinations. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981). But we must affirm the district court's factual findings unless they are clearly erroneous. Fed. R. Civ. P. 52(a); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 838 (3d Cir. 1994) (in banc).

We review the district court's evidentiary rulings principally on an abuse of discretion standard. *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994). We exercise plenary review, however, of its rulings to the extent they are based on a legal interpretation of the Federal Rules of Evidence. *Becker v. Deere and Co.*, 60 F.3d 158, 161 (3d Cir. 1995); *Lippay v. Christos*, 996 F.2d 1490, 1496 (3d Cir. 1993). We review the court's decision on the motion seeking a dismissal by reason of spoliation of evidence on an abuse of discretion standard. *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994).

B. Background Admiralty Law

The Limitation Act provides that when a maritime accident occurs "without the privity or knowledge of [the] owner," the shipowner's liability "shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 App. U.S.C. § 183(a). A shipowner facing potential liability can file a complaint for limitation of liability in a federal district court which then is authorized to stay all other proceedings against the shipowner and receive all claims. 46 App. U.S.C. § 185; Fed. R. Civ. P. Supp. Rule F(4).

Under Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims, the shipowner "may

demand exoneration from as well as limitation of liability." *See Texaco v. Williams*, 47 F.3d 765, 769 n.19 (5th Cir. 1995). Thus, a complaint under the Limitation Act is a two-step process. The district court, sitting in admiralty without a jury, first determines " 'whether there was negligence; [second] if there was negligence, whether it was without the privity and knowledge of the owner; and [finally] if limitation is granted, how the [limitation] fund should be distributed.' " *In re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988) (quoting *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979)). The claimant has the initial burden of showing negligence or unseaworthiness, and then, if the claimant is successful, the burden shifts to the shipowner to demonstrate a lack of privity and knowledge in order to obtain the benefit of limitation of liability. *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 948 n.14 (3d Cir. 1985).

The exclusive admiralty jurisdiction of the federal courts in Limitation Act actions directly conflicts with the "saving to suitors" clause of 28 U.S.C. § 1333, which preserves common law rights in certain maritime cases, including the right to a jury trial. *See Gorman v. Cerasia*, 2 F.3d 519, 524 (3d Cir. 1993). There is a conflict because "[t]here is no right to a jury in actions instituted in admiralty, and the claimants are enjoined from pursuing common law actions in other forums." *Dammers*, 836 F.2d at 755 (citation omitted). The conflict derives from the Seventh Amendment, as the Amendment applies only to cases brought at common law, not those brought in admiralty. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-60 (1847).

There are two exceptions to this exclusive admiralty jurisdiction over Limitation Act proceedings. The first arises when the value of the vessel and its freight exceeds that of all claims, that is the fund is adequate to cover all claims filed against the owner. *See Lake Tankers Corp. v. Henn*, 354 U.S. 147, 152, 77 S.Ct. 1269, 1272 (1957); *Gorman*, 2 F.3d at 524. The second exception arises when there is only one claimant whose claim exceeds the value of the vessel and its freight.[3] In this case, because the second exception

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3. If a single claimant's claim is for less than the value of the vessel and its freight, a limitation proceeding is not needed.

applied, the district court was obliged to dissolve the stay against other proceedings if Newman stipulated to the district court's exclusive jurisdiction to determine all issues relating to limitation of liability. *See, e.g., Ex parte Green*, 286 U.S. 437, 438-40, 52 S.Ct. 602, 602-03 (1932); *Langnes v. Green*, 282 U.S. 531, 540-44, 51 S.Ct. 243, 246-48 (1931); *Gorman*, 2 F.3d at 524. These stipulations must waive any claim of res judicata based on the state court judgment and concede the shipowner's right to litigate all limitation issues in federal court. *Id.* at 524-25; *see also*, Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-19, at 871 (2d ed. 1975).[4]

C. Stipulations and Trial *de novo*

Newman argues that the district court erred in denying his motion to adopt the factual findings of the state court jury on the liability issues and in trying the exoneration and limitation issues *de novo*. However, the case law is clear that in a single claimant/inadequate fund situation like this, the claimant is entitled to proceed in state court after making the appropriate stipulations. *See, e.g., Langnes*, 282 U.S. at 540-44, 51 S.Ct. at 247-48; *Gorman*, 2 F.3d at 524. The requirement that the claimant waive any claim of res judicata from a state court judgment and concede the shipowner's right to litigate all limitation issues in federal court "has been accepted by federal courts for over half a century and is now beyond dispute." *Id.* at 524-25. Any factual findings by the state court jury thus will not bind the federal court in determining the shipowner's right to limitation. *Id.* at 528-29. The Seventh Amendment is inapplicable in such a situation because the finding on the owner's privity and knowledge, which is critical on the limitation issue, is separate from the liability determination made by the state court.

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4. In this opinion, we use the terms "res judicata" and "collateral estoppel" rather than "claim" or "issue" "preclusion" because the stipulation in the district court leading to the dissolution of the injunction against the state court proceedings was that Newman "waive[d] any claim of res judicata based upon any judgment obtained in the State Court proceeding."

The law is less clear on whether a shipowner has the right to litigate the issue of exoneration in federal court without regard to the findings in the state court, as the exoneration issue mirrors the liability determination that the state court makes. The Court of Appeals for the Seventh Circuit recently held in an exoneration and limitation of liability action that the liability issue should be determined in state court and the case should return to the federal court only to decide limitation issues if the claimant wins a judgment in excess of the limitation fund. *In re Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821, 828 (7th Cir.), *cert. denied*, 117 S.Ct. 361 (1996). The Court of Appeals for the Fifth Circuit, however, has held that notwithstanding the inherent redundancy in having overlapping state and federal court proceedings, claimant stipulations can protect both "the shipowner's right to limit liability and [to] litigate the issue of exoneration in federal court. . . ." *Texaco v. Williams*, 47 F.3d at 769. *See also Odeco Oil and Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993) (When "the claimants are so anxious to take advantage of the perceived magnanimity of South Texas juries that they are willing to stipulate essentially that they will submit to two trials — the state court trial followed by a substantially redundant federal limitation proceeding — this court is hard put to deny them.").

In this case it is not necessary for us to take a position on how far a claimant's stipulations must go. In other words, we need not decide whether a district court, as a condition of dissolving the injunction against the state court proceedings, may insist that the claimant waive the res judicata effect of the state court finding on the liability issue because Newman has not preserved his right to raise this issue. Here, in the same manner as the claimants in *Texaco v. Williams*, Newman agreed by stipulation to waive any claim of res judicata regarding issues of both limitation and exoneration. Although the district court required Newman's stipulation as a condition of dissolving the injunction against the continuation of the state court proceedings, Newman could have refused to enter into the stipulation and then appealed the court's refusal to dissolve the injunction without the stipulation. 28 U.S.C. § 1292(a)(1) ("the courts of appeals shall have jurisdiction of

appeals from: (1) Interlocutory orders . . . refusing to dissolve or modify an injunction. . . ."); *see also Gorman*, 2 F.3d at 523.[5] Because Newman did not take such an appeal, or even object to the form of the stipulations in the district court, we will not review the issue, *see Dillinger v. Caterpillar*, 959 F.2d 430, 447 (3d Cir. 1992), and Newman is now bound by the stipulations he made and cannot argue that the district court required them improperly.[6] We therefore need not decide whether a claimant in a limitation action must waive the res judicata effect of the state court proceedings as to both limitation and exoneration issues in order to proceed in state court under the saving to suitors clause. We do indicate, however, that we have serious doubts that the claimant must do so; thus the district courts should not read this opinion as approving implicitly a requirement that the stipulation waiving the res judicata effect of the state court action include liability issues.

D. Jury Trial and the Seventh Amendment

Newman argues further that even if retrial of the exoneration issue in the federal court was appropriate, it should have been before a jury. Newman's problem here is that while Congress can provide for jury trials in admiralty cases, as it has done under the Jones Act, the Seventh Amendment does not provide a right to a jury trial in admiralty. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 1650 (1963). While an admiralty claim may be heard by a jury when it is joined with a claim for which there is a right to a jury trial, *id.*, Newman did not bring his Jones Act and unseaworthiness claims in federal court where he might have been able to obtain a

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5. Newman's attorney conceded at oral argument that under Fifth Circuit case law he could have filed such an appeal, but contended that he could not in the Third Circuit. We find unpersuasive his argument that the plain language of section 1291(a)(1) differs depending on which circuit you are in.

6. In addition, judicial estoppel would apply in this case. The district court dissolved the injunction based on Newman's stipulations. Newman cannot change position now and argue that those stipulations are not binding upon him. *See Murray v. Silberstein*, 882 F.2d 61, 66 (3d Cir. 1989).

jury trial on the claims relating to exoneration.[7] *See Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 965 (3d Cir. 1979); *Red Star Towing & Trans. Co. v. Ming Giant*, 552 F. Supp. 367, 371 (S.D.N.Y. 1982). Instead, Newman brought his Jones Act and unseaworthiness claims in state court, and later entered into stipulations to stay Consol's exoneration/limitation action and return to state court where he won a jury verdict. Thus, the case in the district court was entirely an admiralty case which did not include a right to a trial by jury. *See Cooper v. Loper*, 923 F.2d 1045, 1048 (3d Cir. 1991). We are not aware of any authority holding that a nonjury admiralty claim must be tried to a jury when it is not joined with another claim which carries a right to a jury trial.

Newman seems to think that the district court retried his Jones Act and unseaworthiness claims. That belief is not correct. Those claims were tried in the state court. The district court tried only the limitation/exoneration action, an admiralty case for which there is no right to a jury trial. As we indicated in *Gorman*, 2 F.3d at 524, a proceeding under the Limitation Act is heard by a court sitting in admiralty without a jury. We will not allow a claimant in a limitation action to obtain consecutive jury trials in the state and federal courts through the device of characterizing his claim in the limitation action as being predicated on the Jones Act or unseaworthiness. Thus, no matter how Newman characterizes his claim in the limitation action, his claim was a part of that action. *See In re McCarthy Bros. Co.*, 83 F.3d at 826 ("Claimants have no right to a jury in admiralty actions, and thus lose their right to pursue common law remedies before a jury when forced into admiralty court under the Limitation Act.") (citation omitted).

In trying the admiralty action, the district court considered independently issues decided earlier by the state court jury, but reached a different result. Yet the inconsistency was entirely appropriate because Newman waived any claim to res judicata based on the state court

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7. We, of course, do not rule that he could have obtained a jury trial in these circumstances as the situation we describe is not before us.

proceeding with respect to exoneration. We emphasize that we are not concerned here with a situation in which a claimant brings his Jones Act and unseaworthiness claims in a district court and then the shipowner brings a limitation action.

Newman argues that by trying the exoneration issue *de novo*, the district judge was re-examining the facts found by the state court jury contrary to the Seventh Amendment. But the cases Newman cites on this point all involved situations where the trial or appellate court rejected or modified a jury's factual finding in the same case. Here, the jury findings were in a different forum. Normally, res judicata or collateral estoppel would apply in such circumstances because both the state claims and the exoneration/limitation action arose from the same set of events. Here, however, Newman explicitly waived any right to res judicata on the limitation and exoneration issues.[8] Thus, the Seventh Amendment did not forbid the independent examination in the admiralty case of the issues previously adjudicated in the state court case. Newman received a jury trial for those claims in the forum in which he was entitled to one.

Adopting the facts found by the state court jury would mean that the state court proceedings had res judicata application on the exoneration issue and would eliminate Consol's right to litigate the exoneration issue in the district court. Such an application would be directly contrary to Newman's stipulation in the district court to Consol's right to litigate in the district court all issues relating to both exoneration and limitation. The district court did adopt the jury's findings on damages because the damages issue was not covered by Newman's waiver of res judicata. Thus, the state court trial was not a "complete nullity" as Newman now claims. Newman may consider his efforts in state court to have been a waste of time, given the final result, but he was the party who sought to be in state court, and as he entered into the stipulations which have led to this result, he must live with their consequences.

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8. This court in *Gorman* held that the term "res judicata" in a limitation action stipulation also encompasses the doctrine of issue preclusion. 2 F.3d at 528-29.

E. District Court Factual Findings

We turn now to the second area of inquiry on appeal, the area relating to the trial itself. Newman argues that the district court's factual findings in support of its decision to exonerate Consol from liability were clearly erroneous in several respects. First, he contends that Consol did not disclose in pretrial proceedings that it was claiming that the leaving line Newman used was cut after the accident. The evidence Newman has for this contention is one response from Consol's attorney at a pretrial conference. After Newman's attorney asked if the legal theory of the case was that the rope was cut after the accident, Consol's attorney said: "No, I don't believe that is the theory." App. at 1110. Newman does not mention, however, that the court responded first to Newman's attorney's inquiry by saying: "Well, that has been mentioned as one of the, certainly one of the theories. I don't know that that's, that is the, the theory." *Id.* Then, after Consol's attorney responded, the court said: "But they certainly have, I've seen it in their pretrial report, mentioned there." In the circumstances, Consol's attorney's statement easily can be seen as a response to the court that it was not the only theory, although it was a possible theory.

This conclusion is consistent with Consol's earlier statements on the matter. Consol argued in its pretrial statements that the rope was cut, but it did not know when it was cut, and if it had been cut before the accident Newman should have seen it and replaced the rope. App. at 88-89, 1086 ("It is presently unknown precisely when the rope in question was cut, or by whom it was cut, except that it was cut prior to being brought to Consolidation's marine ways landing after the alleged accident."). These statements are consistent with the court's factual finding that Consol cannot be deemed to have waived or disclaimed the issue.

Newman also argues that there is no evidence to support the court's finding that Newman slipped. Newman has no memory of the accident, and Stinson, the only witness, was looking away when Newman began to fall and only turned back when Newman already was falling backwards. Thus, Newman is correct that there is no direct evidence that

Newman slipped, nor could there be. The district court apparently inferred that Newman slipped after the court first found that the rope did not break, but was cut after the accident. We cannot find these factual findings clearly erroneous because there is clear support for them in the record.

Clegg, the expert witness, testified that the rope had been cut almost entirely through except for a few yarns (of 156 total yarns in the rope) on the outside of the rope which broke under tension. Newman appears to argue that the line was cut before the accident, but remained at least partly attached until Newman pulled on it so that it was the breaking of the remaining intact yarns that caused him to fall. This theory is consistent with the facts, but so is the one reached by the district court, that the rope was cut through after the accident. This conclusion is particularly plausible, because it would be fairly obvious if a rope was held together by only a few of 156 yarns, and Newman testified that he would have replaced bad line had he noticed it. We do not decide which version of the facts we find more probable. The district court decided that the rope was cut after the accident and we cannot say that this finding was clearly erroneous.

Given the finding that the rope did not break, but was cut, a permissible if not a necessary inference to be drawn is that Newman slipped. He was walking along a 2-3 foot gunnel on the barge with large drop-offs on either side, a situation which presents a severe slipping hazard. We cannot find clear error in the conclusion that he fell in these circumstances.

If the rope did not break, and was cut after the accident, then it was not defective. Newman's theory of liability for his unseaworthiness and negligence claims was that Consol provided defective rope. Newman offered no other evidence of Consol's negligence or the unseaworthiness of the tug and the barge. Inasmuch as the court found that the rope was not defective, and we affirm the factual findings supporting this conclusion, the legal finding that there was neither negligence nor unseaworthiness also must be affirmed.

F. Evidentiary Rulings

Newman also challenges certain evidentiary rulings by the district court. Newman attempted to introduce a Consol safety memo regarding the accident. The memo, prepared May 2, 1989 (five days after the accident) by David Kreutzer, stated that an employee fell after a leaving line broke and cautioned all employees to inspect ropes carefully before using them. Consol objected that this memo was a subsequent remedial measure and thus inadmissible under Fed. R. Evid. 407, and the court agreed. While the dissent argues that the memo is not a subsequent remedial measure within the meaning of Rule 407 because Newman only sought to admit the portion dealing with Consol's investigation of the accident, dissent at 19, there is authority supporting the exclusion of evidence of post-accident investigations under Rule 407. *See Specht v. Jensen*, 863 F.2d 700, 701-02 (10th Cir. 1988) (upholding exclusion of press release detailing city investigation of incident and response to problem discovered);[9]; *Alimenta v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984) (excluding post-incident report and recommendations for improvement). Furthermore, Newman argues that the memo should have been admitted under an exception to Rule 407, as he contends that he offered the memo only to impeach the testimony of Truntich that the line looked like it had been cut with an ax. Thus, the district court properly considered the memo within the framework of Rule 407.

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9. The dissent relies on *Rocky Mountain Helicopter v. Bell Helicopter*, 805 F.2d 907 (10th Cir. 1996), for the proposition that post-event "tests or reports" are not within the ambit of Rule 407. See dissent at 19-20 n.3. *Rocky Mountain* dealt with tests and reports designed specifically to determine the nature of a problem, though, while the memo in question here was a "safety alert," app. at 1279. This "safety alert" was designed to alert Consol employees to a potential danger, worn lines, and advise them of measures to avoid this danger, closer inspection. This is inherently a subsequent remedial measure designed to prevent future accidents rather than an investigation or test "conducted for the purpose of . . . discover[ing] what might have gone wrong or right." *Rocky Mountain*, 805 F.2d at 918. Thus, *Specht* is more relevant to this case than *Rocky Mountain*.

It can be reversible error to exclude evidence of a subsequent remedial measure when it is offered entirely for impeachment purposes. *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34, 38 (3d Cir. 1989). Yet a court must interpret the impeachment exception to Rule 407 circumspectly because "*any* evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach [a party's] testimony. . . ." *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir. 1984) (emphasis added). Accordingly, the evidence offered for impeachment must contradict the witness's testimony directly. *See Kelly v. Crown Equip. Co.*, 970 F.2d 1273, 1278 (3d Cir. 1992). Here, Truntich testified that the line appeared to him to have been cut by an ax. The Kreutzer memo described an accident where a line broke, presumably Newman's although no names were mentioned. But the memo does not directly contradict Truntich's testimony. Truntich only was offering his opinion of the appearance of the line immediately following the accident. As the Court of Appeals for the First Circuit has held, there must be "a greater nexus between the statement sought to be impeached and the remedial measure than the case at bar." *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 31 (1st Cir. 1992). The district court thus correctly interpreted Rule 407 and did not err in excluding the evidence.

It is also important to point out that, as we observed above, there was evidence that the line was not cut after the accident. Thus, when Kreutzer wrote his memo, it was entirely natural for Consol to give the warning it did. After all, it surely was appropriate to tell employees to inspect ropes before using them.

Furthermore, the memo recited that it was based on Consol's "investigation." Thomas Brown testified that the line did not look freshly cut, but obviously the district court rejected that evidence at the trial. In the circumstances, it is hardly conceivable that the introduction of the memo at trial could have altered the outcome of the bench trial in this case. While the dissent suggests that the memo would have corroborated Brown's testimony, we do not see how it could have added any further corroboration to the evidence at the trial in the absence of a showing that the

"investigation" which led to Kreutzer sending the memo led to information not available at trial. As far as we are aware, Newman did not make any such showing. Certainly his brief does not say he did.

The second evidentiary ruling that Newman challenges is the denial of his motion to dismiss this limitation action for spoliation of evidence. Newman argues that the denial of this motion is inconsistent with the court's factual finding that the rope was cut after the accident because if it was cut, Consol must have cut the rope and prevented Newman from examining it in one piece, or substituted a cut rope for the rope that broke. But the court's rulings are not contradictory. Consol employees testified that they retrieved the two pieces of the line once the barge was brought back to the repair facility and showed a chain of custody from that point forward. Stinson testified that he saw the line in two pieces after Newman fell and that he did not cut the line. Stinson admitted that there were cutting tools on the tug and that he handled the rope in removing Barge 1029 from the empty fleet to take Newman to medical attention. The district court, faced with this testimony, could have discredited Stinson's contention that he did not cut the line and inferred that he did. There is absolutely no evidence that Consol substituted the cut line for a broken line, and Newman's argument that Consol cut the line is inconsistent with his theory that the line broke. Thus, there was no compelling reason for the court to find that Consol destroyed any evidence. In the circumstances, the court surely did not abuse its discretion in denying Newman's motion to dismiss on spoliation grounds.

III. CONCLUSION

The order of the district court entered July 18, 1996, exonerating Consol from liability will be affirmed. Therefore, we need not consider Newman's arguments that Consol had privity and knowledge and thus is not entitled to limitation of liability.

McKEE, Circuit Judge, dissenting in part and concurring in part.

I must respectfully dissent from part II.F. of the majority opinion. Although I concur with the rest of the majority's analysis, I believe that the district court erred in excluding the Kreutzer memorandum under Rule 407 of the Federal Rules of Evidence. Moreover, I do not believe that this error was harmless, and I would therefore remand for further proceedings.

The condition of the rope or "leaving line" was crucial to the determination of Consolidation Coal's liability. Those lines are used to tie barges together and can, in good condition, withstand a force of over 18,000 pounds. The district court concluded that the leaving line Newman was holding when he fell had been cut. Clearly, if that line was cut after plaintiff fell, as the district court concluded, Consolidation Coal would not be liable. However, if before the fall, the line had been cut or was in defective condition, Consolidation may well be liable. *See Earles v. Union Barge Line Corp.*, 486 F.2d 1097, 1104 (3d Cir. 1973) (A shipowner has a duty "to furnish a reasonably safe place for . . . one working aboard the barge to perform his chores . . . [The breach of that duty] results in liability for negligence when the breach proximately causes injury to a foreseeable person."). "[A] shipowner's duty to furnish a seaworthy ship is absolute and completely independent of his duty . . . to exercise reasonable care . . . ." *Id.* at 1105 (internal quotations omitted); *see also Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 222 (3d Cir. 1977).

Louie Truntich, the assistant foreman at the time of the accident, testified that he saw the leaving line on the day of the accident after Newman's fall, and it appeared to have been "cut with an axe. . . . It was just a nice, smooth, straight cut." App. at 1271a. Newman sought to discredit this testimony by introducing a memo circulated five days after his accident by David Kreutzer, the top company official on the scene the day of the accident. That memorandum stated in part:

> Our investigation showed that *the line had suffered prior damage* and although it was the normal 1-1/2

> [inch] MPO leaving line typically used for this purpose, *a close inspection should have pointed out the damage and the line should have been taken out of service.*

App. at 1279a (emphasis added).[1] The district court excluded this evidence under Rule 407 of the Federal Rules of Evidence as a subsequent remedial measure presumably because the memo goes on to announce that, in the future, "careful examination of the rigging and lines shall be made prior to their use in any operation." App. at 1279a. Rule 407 states:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence . . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as . . . impeachment.

Fed. R. Evid. 407. Certainly, if Newman sought to admit the memo's language about examining the lines, then Rule 407 would be implicated. The record clearly reflects, however, that Newman only sought to admit that portion related to the company's investigation into his accident.[2] I do not believe that this proffered evidence was within the scope of Rule 407. Therefore, I would remand this case to the district court for a determination of whether that evidence could have been excluded on other grounds or whether it should have been admitted.

Even if the memo's statement about the company's investigation into Newman's accident is a subsequent remedial measure,[3] the district court should have

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1. Although the memo does not specifically mention Newman's name, it is clear from its content and date that it is referring to his fall.

2. The memo could have been redacted to exclude the language regarding the "subsequent remedial measure."

3. Arguably, the last few lines of the above excerpt suggest remedial action that would fall within the scope of Rule 407: "[A] *close inspection should have pointed out the damage* and the line should have been taken out of service." App. at 1279a (emphasis added). However, that inference is tenuous at best.

determined whether it was nevertheless admissible under Rule 407 as impeachment evidence.[4] If, as the memo suggests, the condition of the rope was such that "*a close inspection*" would have disclosed that the line should not have been used, the district court could have rejected Truntich's testimony that the rope appeared to have been "cut with an axe" and concluded that it was not "just a

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The majority suggests that Kreutzer's memo was unambiguously within the scope of Rule 407 and further contends that "there is authority supporting the exclusion of evidence of post-accident investigations under Rule 407." Majority Op. at 15. In support of its position, the majority cites *Specht v. Jensen*, 863 F.2d 700, 701-02 (10th Cir. 1988) and *Alimenta v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984). Both cases involved an attempt by one party to admit a document specifically for the subsequent remedial measures it contained. As I explained above, that is not the case here; Newman clearly only wanted to admit the findings from Consolidation's investigation, namely, "that the line had suffered prior damage," not the company's response thereto.

This distinction is explained in the Tenth Circuit's opinion in *Rocky Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907 (10th Cir. 1986), *cited in Specht*, 863 F.2d at 702.

> It would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports. It might be possible in rare situations to characterize such reports as "measures" which, if conducted previously, would reduce the likelihood of the occurrence. Yet it is usually sounder to recognize that such tests are conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right. *Remedial measures are those actions taken to remedy any flaws or failures indicated by the test.* In this case, the remedial measure was not the Photoelastic Study of the trunnion but rather the subsequent redesign of the trunnion.

Rocky Mountain, 805 F.2d at 918. In *Rocky Mountain*, all references to the redesign were excluded at trial, *see id.*, which is what I suggest could have been done with respect to the Kreutzer memo's references to Consolidation's post-accident implementation of an inspection policy.

4. If Truntich was an agent of the company, then his statement about the rope's condition could be impeached by the statement in the company memo. I take no position as to whether the record supports the conclusion that Truntich was testifying as an agent of Consolidation Coal, however.

nice, smooth, straight cut" as Truntich testified. At the very least, the memorandum would have corroborated the testimony of Thomas Brown, the foreman at the repair facility. Brown testified that the rope did not look freshly cut.

The majority suggests that the memorandum did not directly contradict Truntich's testimony and cites *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 31 (1st Cir. 1992), in support of its statement that "Truntich only was offering his opinion of the appearance of the line immediately following the accident. . . . [T]here must be 'a greater nexus between the statement sought to be impeached and the remedial measure than the case at bar.'" Majority Op. at 16. However, the appearance of the rope immediately following the fall was crucial evidence. Indeed, I can think of no other basis for the district court's conclusion that the rope had been cut after the fall than how the rope appeared immediately afterwards.

In *Kenny v. Southeastern Pennsylvania Transportation Authority*, 581 F.2d 351 (3d Cir. 1978), we allowed evidence of new lighting fixtures that were installed on a train platform after an assault there to impeach the testimony of a SEPTA employee that platform lights were inspected daily. In *Petree v. Victor Fluid Power, Inc.*, 887 F.2d 34 (3d Cir. 1989), we ruled that the district court committed reversible error in refusing to admit evidence of a warning decal that had been applied years after plaintiff's injury when that evidence was offered to impeach testimony that a mechanical press had no inherent dangers. I believe Kreutzer's memo could have been admitted for similar purposes.

Moreover, it is important to bear in mind that the exoneration/limitation proceeding was a bench trial so the court's usual concern that the jury will misuse the impeachment evidence is absent. Accordingly, the majority is far more concerned about the dangers of admitting evidence of a "remedial action" than is warranted by the circumstances of this case. *See* majority op. at 16 (quoting *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 468 (7th Cir. 1984)(suggesting that "*any* evidence of subsequent remedial measures might be thought to . . . impeach")).

"The reason for the exclusion [of remedial measures after an accident] is to encourage post-accident repairs or safety precautions in the interest of public safety." *Kenny*, 518 F.2d at 351. That public policy is not furthered by excluding the language in Kreutzer's memo that simply described the condition of the rope and stated that the leaving line "had suffered prior damage." App. at 1279a.

Although the district court could have rejected this evidence and accepted Truntich's testimony, I believe that testimony was so crucial that Newman is entitled to have the district court reconsider the admissibility of this evidence. If the court determines that there is no other obstacle to receiving that memo into evidence, then the court should reexamine the question of Consolidation's liability in light of this additional evidence. Accordingly, I respectfully dissent from section II.F. of the majority opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 96-3434

COMPLAINT OF CONSOLIDATION COAL COMPANY,
as Owner of the Motor Vessel Elizabeth
and as Charterer of Barge Number MC 1029,
for Exoneration From or Limitation of Liability

GEORGE NEWMAN,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 90-01206)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges, and GREENAWAY,* District Judge

The petition for rehearing filed by the appellant, George Newman, in the above captioned matter having been

*Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

_____

Circuit Judge

DATED: Oct. 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the M/V Elizabeth and as Charterer of Barge No. MC 1029, for exoneration from or limitation of liability.	))))))	Civil Action No. 90-1206

ORDER

AND NOW, this 17th day of July, 1996, this Court having heard testimony at a non-jury trial held in the above captioned matter on July 8, 1996, and in accordance with this Court's Findings of Fact and conclusions of Law filed herewith,

IT IS HEREBY ORDERED that claimant George Newman's claim is DISMISSED, the Court finding that Consol is entitled to exoneration from liability.

There being no further matters pending before this Court, the Clerk of Court is directed to mark the above captioned matter CLOSED.

Alan N. Bloch
United States District Judge

cc: James Miller, Esquire
400 Two PPG Place, Suite 400, Pittsburgh, PA 15222

Paul Hammer, Esquire
512 Frick Building, Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the M/V Elizabeth and as Charterer of Barge No. MC 1029, for exoneration from or limitation of liability.	))))))	Civil Action No. 90-1206

FINDINGS OF FACT

The Parties

1. Consolidation Coal Company (Consol) is a Delaware corporation having offices in Elizabeth, Pennsylvania.

2. George Newman, the claimant, is an individual residing at 324 Water Street, North Charleroi, Pennsylvania.

The Relevant Background

3. In 1989, Consol owned and operated a facility known as the Elizabeth Marine Ways, located along the Monongahela River in Elizabeth, Pennsylvania, at which it repaired coal barges.

4. Consol also operated what was known as the "empty fleet" on the opposite side of the Monongahela River from the Marine Ways, at which it stored empty barges.

5. Newman had been employed by Consol as a deckhand since 1980 on the Motor Vessel Elizabeth (M/V Elizabeth), a towboat owned and operated by Consol.

6. The M/V Elizabeth was used in maneuvering barges between the empty fleet, where the barges were stored, and the Marine Ways, where the barges were repaired.

7. Newman's responsibility as a deckhand on the M/V Elizabeth included assisting the movement of barges from these locations.

8. In performing this task, Newman was required to walk upon a two-foot walkway on the sides of the barges called the "gunnels."

9. More specifically, when returning barges to the empty fleet, Newman was required to walk upon the gunnels to the midpoint of the barge where he then utilized a "leaving line" to tie the barge upon which he was standing to another barge in the empty
fleet.

10. A "leaving line" is a rope approximately two inches thick in diameter that is made of a strong plastic material. A leaving line in good condition can hold over 18,000 pounds.

11. Consol made good leaving line available to Newman and other deckhands at all times.

12. It was the responsibility of each person using a particular line to ensure that the line was fit for its intended use.

Newman's Accident

13. On April 27, 1989, Newman was involved in an accident during the course of his employment as a deckhand with Consol.

14. Immediately before the accident, Newman, along with the pilot of the M/V Elizabeth, Timothy Stinson, had taken an empty barge, Barge No. MC 1029 (Barge 1029),

from the Marine Ways where it had been repaired across the Monongahela River for placement in the empty fleet.

15. After Stinson had positioned Barge 1029 in an open space in the empty fleet, Newman walked out along the gunnels to attempt to secure Barge 1029 to another barge located in the empty fleet.

16. While attempting to secure the two barges together, Newman slipped and fell into the hold, or bottom, of Barge 1029, and he sustained serious head and other injuries.

17. Just prior to Newman's fall, Stinson observed Newman pulling upon a leaving line.

18. Following the accident, a leaving line was retrieved from Barge 1029, in the vicinity of Newman's accident.

19. An examination of that leaving line after the accident, showed it to be separated.

20. Expert testimony established that said leaving line was not separated by tensil pull but had been cut through its entirety.

21. The cutting of the leaving line occurred after Newman's accident.

22. Therefore, the condition of the leaving line could not, have caused Newman's accident.

The Instant Litigation

23. In 1990, Newman filed a complaint against Consol under the Jones Act and other maritime laws in the Allegheny County Courts of Common Pleas. In the state court action, Newman alleged that Consol was responsible for his injuries on the grounds that: (1) Consol was negligent for, among other things, failing to provide proper leaving line, failing to properly inspect the leaving line, and failing

to warn Newman regarding the condition of the leaving line; and (2) Consol had maintained its vessel in an unseaworthy condition because the leaving line was not fit for its intended use.

24. Subsequently, on July 20, 1990, Consol instituted the instant action seeking exoneration from, or limitation of, its liability with respect to the claimant's state court action pursuant to 42 U.S.C.App. §183, *et seq.*[1]

CONCLUSIONS OF LAW

1. "A shipowner facing potential liability for a maritime accident may file suit in federal court seeking protection under the [Limitation of Liability] Act [46 U.S.C. §§181-195] ...." *In re Complaint of Port Author Towing Co.*, 42 F.3d 312, 315 (5th Cir.), *cert. denied*, 116 S.Ct. 87 (1995).

2. Under the Limitation Act, a shipowner is entitled to "exoneration [from liability as a result of a maritime accident] if he, his vessel, and crew are found to be completely free from fault;" that is, if the shipowner is not liable either under the doctrine of negligence or unseaworthiness. *See, e.g., In re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1203 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 1848 (1996).

3. "Even if not completely free from fault,

[1]Although this Court had originally stayed Newman's state court action, the Court lifted the stay upon the parties' stipulation. The state court action eventually proceeded to trial, and this trial resulted in a verdict for Newman. Consol subsequently petitioned this Court to reopen this matter, as the parties had stipulated that this Court would retain the ability to determine *all* issues regarding Consol's complaint for exoneration from, or limitation of, its liability. As a result, on July 8, 1996, this Court heard evidence regarding this matter.

[however,] the shipowner is entitled to limitation of liability if the shipowner had no knowledge of or privity to the ship's negligence or unseaworthiness." *Id.*; *see also Gorman v. Cerasia*, 2 F. 3d 519, 523 (3d Cir. 1993).

4. A typical limitation proceeding under the Act generally consists of a two-step process. *Suzuki Orange Park, Inc. v. Shubert*, No. 95-2418, 1996 WL 328058, at *2 (11th Cir. July 1, 1996); *In re Cleveland Tankers, Inc.*, 67 F.3d at 1203; *In re Complaint of Port Author Towing*, 42 F.3d at 317.

5. Under the first step, the claimant bears the burden of establishing liability on the part of the shipowner. *Id.*

6. This step is necessary because the "'whole doctrine of limitations of liability [under the Act] presupposes that a liability exists which is to be limited. If no liability exists, there is nothing to limit.'" *In re Complaint of Port Author Towing*, 42 F.3d at 317 (citation omitted).

7. In order to meet his initial burden of establishing liability, a claimant may show that his injuries were the result of some act of negligence on the part of the shipowner. *In re Cleveland Tankers*, 67 F.3d at 1203.

8. In order to sustain a claim for negligence, a claimant must prove the following elements by a preponderance of the evidence: (1) at the time of his injury, he was acting in the course of his employment as a member of a crew of a vessel; (2) that his employer, acting through either officers or employees, was negligent in some manner; and (3) that such negligence *was a cause, no matter how small, in bringing about the actual damage sustained by him.* Devitt, Blackmar and Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL, §§95.02; 95.09; *see also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 771 (9th Cir. 1981) (noting that in order for a seaman to recover on a negligence

claim, "[t]he plaintiff has the burden of establishing by a preponderance of the evidence, negligence on the part of his employer or one for whom the employer is responsible," and, then, the claimant must establish that the act of negligence was a cause, however slight, of his injuries).

9. A claimant may also meet his initial burden in a limitation proceeding by establishing that his injuries were the result of an unseaworthy condition upon a vessel. *See In re Cleveland Tankers, Inc.*, 67 F.3d at 1203.

10. "The doctrine of unseaworthiness basically imposes on a shipowner a nondelegable duty to provide seamen a vessel that *is reasonably fit for its purpose.*" *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 631 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996) (emphasis added).

11. In order to recover on a claim of unseaworthiness, a seaman must establish each of the following elements by a preponderance of the evidence: (1) that the seaman was a member of the crew of a vessel in navigation at the time he suffered injuries; (2) that the vessel was unseaworthy in one or more respects; and (3) *that the unseaworthy condition was a substantial cause contributing to the damage sustained by the seaman.* Devitt, et al., *supra*, at §95.15.

12. If the claimant does not meet his burden of proving a shipowner's liability for negligence or unseaworthiness, the Court's inquiry is at an end, and the shipowner is entitled to exoneration, from any liability. *See, e.g., In re Complaint of Port Author Towing*, 42 F.3d at 317; *In re Security Barge Line, Inc.*, 644 F.Supp. 85, 89 (E.D. Miss. 1989).

13. If the claimant satisfies this burden, however, the burden then shifts to the shipowner seeking limitation of its liability to establish lack of privity or knowledge of the

dangerous condition that caused the accident. *Suzuski Orange Park, supra*, at *2.

14. In the instant case, the Court finds that Newman has failed to carry his initial burden of establishing liability on the part of Consol.

15. More specifically, Newman has failed to prove that Consol is liable under the doctrine of negligence because Newman has failed to prove by a preponderance of the evidence that any act of negligence on the part of Consol *caused* his injuries.

16. Indeed, although Newman has argued that Consol was negligent by providing defective leaving line and/or by failing to warn Newman of the defective nature of the leaving line, the court finds that the leaving line was cut after his accident occurred. Therefore, Newman has not proved that the defective nature of the leaving line played a role, however small, in *causing* his accident. *Cf. Fedorcvzk v. Carribean Cruise Lines, Ltd.*, 82 F.2d 69, 75 (3d Cir. 1996) (*citing* Restatement (Second) of Torts §433(B) which provides that: "[a] mere possibility of causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant.").

17. For the same reason, Newman has not sustained his burden of proving that Consol is liable under the doctrine of unseaworthiness.

18. Once again, Newman has alleged that Consol maintained its vessel in an unseaworthy condition because the leaving line at issue was not fit for its intended use, and that this unseaworthy condition caused his accident.

19. However, as previously stated, the Court finds that the leaving line was cut after the accident occurred and, therefore, the condition of the line could not have caused the

accident at issue.

20. In sum, without any proof as to causation, Newman cannot sustain his burden of demonstrating that Consol is liable under the doctrine of negligence or under the doctrine of unseaworthiness.

21. Accordingly, the Court finds that Consol is entitled to exoneration from liability and Newman's claim against Consol will be dismissed.

Date: 7/17/96

Alan N. Bloch
United States District Judge

cc: Counsel of record.

Order of August 4, 1995 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for exoneration from or limitation of liability.

O R D E R

AND NOW, this 4th day of August, 1995, upon consideration of Claimant's Motion to Adopt the Findings of the Jury as the Findings of the Court (document No. 43) filed in the above captioned matter on July 19, 1995, and upon further consideration of Complainant's Response thereto,

IT IS HEREBY ORDERED that said Motion is DENIED.

"The Limited Liability Act [the Act], 46 U.S.C. App. §§181-196, provides that the liability of a shipowner incurred as a result of a maritime accident 'without the privity or knowledge of such owner ... shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.' " *Gorman v. Cerasia*, 2 F.3d 519, 523 (3d Cir. 1993) (*quoting* 46 U.S.C. App. §183(a)). Under the Act, a vessel owner may file a suit in a district court seeking a judgment

exonerating or limiting its liability to a claimant. *In re Midland Enterprises, Inc.*, 886 F.2d 812, 813 (6th Cir. 1989).

Federal courts have exclusive admiralty jurisdiction over suits brought pursuant to the Act, *Langnes v. Green*, 282 U.S. 531, 540 (1931); *In re Midland Enterprises, Inc.*, 886 F.2d at 813, and if a shipowner files a complaint seeking protection under the Act, the district court is authorized to stay all other legal proceedings against the owner. *Gorman*, 2 F.3d at 523. Thereafter, "the district court, sitting in admiralty *without* a *jury*, determines" whether exoneration or limitation of the shipowner's liability is appropriate. *Id.* at 524 (emphasis added).

Nevertheless, where a *single* claimant brings a separate action against a shipowner seeking damages in excess of the value of the owner's vessel, a district court must lift the stay and permit the other action to proceed, but *only* if "the claimant stipulates that the [district] court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under the Act." *Id.* As the Court of Appeals for the Third Circuit has stated:

> Specifically, the claimant must waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court, and concede the shipowner's right to litigate *all issues* relating to limitation in the federal limitation proceeding. The necessity of these two stipulations has been accepted by federal courts for over half a century and now is beyond dispute.

Id. at 524-25 (emphasis added) (citations omitted).

In this case, the claimant—who as a single claimant had previously been permitted to proceed with a state court action—currently requests that this Court adopt

the findings of the state court jury as the findings of the Court in this limitation proceeding. The claimant raises four arguments in support of his motion. The claimant initially contends that the Seventh Amendment precludes a re-examination of the jury's findings because the claimant is entitled to a jury trial with respect to his Jones Act claim. The claimant next argues that this Court lacks jurisdiction to review the judgment of the state court because only the United States Supreme Court has authority to review judgments of state courts. The claimant continues that considerations of judicial economy preclude relitigation of the issues already decided in the state court proceeding. Finally, the claimant argues that the complainant waived its right to have this Court determine the limitation issues under the Act by litigating these issues before the state court.

The claimant's arguments are unpersuasive. First, it is well-settled that claimants do *not* have a right to a jury trial in limitation proceedings brought under the Act, *see Gorman*, 2 F.3d at 524; *In re Dammaers and Vanderheide and Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 754 (2d Cir. 1988); thus, any argument that this Court is required by Seventh Amendment principles to adopt the state court jury's findings is without merit.

Second, it is also beyond dispute that this Court has jurisdiction to decide *all issues* related to limitation of a shipowner's liability under the Act; in fact, not only does this Court have *jurisdiction* over this matter, it has *exclusive jurisdiction* over limitation issues. *See, e.g.*, 28 U.S.C. §1333; *In re Midland Enterprises, Inc.*, 886 F.2d at 813-14. This Court is not sitting in review of the state court judgment, but it is deciding the limitation issues presented under the Act in the first instance.

Third, considerations of judicial economy do not prevent this Court from deciding the limitation issues presented. The claimant himself requested relief from the stay and was responsible for any delay in the instant litigation. While under existing admiralty law, the claimant clearly had the option to proceed first in state court, the claimant cannot now rely on considerations of judicial economy to prevent this Court from deciding the limitation issues that remain in this case.

Finally, this Court notes that before it could permit the claimant to proceed with its state court action, the claimant was required to stipulate that the complainant "shall have the right to litigate *all issues* relating to its claim of limitation and exoneration of liabilty" before this Court. (Stipulation at ¶2) (emphasis added). Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimaint's stipulation when it agreed to litigate in a different forum.

Therefore, because the claimant has provided the Court with no authority to support its position that the Court should adopt the findings of the state court jury in this limitation proceeding, the claimant's motion is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: James Miller, Esquire
400 Two PPG Place, Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Transcript of Status Conference
of July 31, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206
Pittsburgh, Pennsylvania
July 31, 1995, 3:50 PM

CONSOLIDATION COAL COMPANY,
Plaintiff,

vs.

GEORGE T. NEWMAN and
SUZANNE M. NEWMAN,
Defendants.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE ALAN BLOCH,
DISTRICT JUDGE

APPEARANCES:

For Plaintiff:
Dickie, McCamey & Chilcote
BY: JAMES A. MILLER, ATTORNEY
RODGER L. PUZ, ATTORNEY
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Consol, Inc.
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For Defendants:
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Pittsburgh, Pennsylvania 15219

Zittrain & Zittrain
BY: RUTH A. ZITTRAIN, ATTORNEY
600 Allegheny Building
Pittsburgh, Pennsylvania 15219

Official Reporter:
Marilyn Brown
1025 United States Court House
Pittsburgh, Pennsylvania 15219
Telephone: (412) 355-0687

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

(In the conference room at 3:50 PM
on July 31, 1995.)

THE COURT: This is the date and time we have set for a status conference in the matter of Consolidation Coal vs.—not versus anybody, I guess, for a limitation of liability award at Civil Number 90-1206. I guess the purpose of today's conference is to set a schedule for just where we stand and where we're going from here, and I know that although I haven't looked it over, there was a motion filed to adopt the jury's findings in State Court, and I thought, Mr. Hammer, that we had a stipulation that we weren't to do that.

MR. HAMMER: No, Your Honor. We stipulated that we would not invoke res judicata. That's not why we're here. We're here asking the Court by this motion to do only one thing, and that is to take the findings of the State Court jury and then the Court will proceed—as

I envision it, this Court will then proceed to go ahead and consider and litigate the question of Consol's rights in the petition that has been filed in the case.

THE COURT: Okay. What's your position, Mr. Miller?

MR. MILLER: Your Honor, our position is that there's a stipulation on record signed by Mr. Hammer and approved by this Court which specifically states, number one, that there will be no claim of res judicata based on any judgment obtained in State Court, but in addition, it also states that "Consolidation Coal Company shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability in the present proceeding at the above caption," and we believe we—

THE COURT: Well, isn't what we have to do is just determine whether they have a limitation of liability? And then you can go ahead and do whatever you want with whatever judgment you got in State Court.

MR. HAMMER: Yes, sir.

THE COURT: So I don't have to do anything except determine in this case—

MR. HAMMER: Yes, sir, but—

THE COURT: —the limitation of liability. I don't have to adopt anything.

MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.

THE COURT: Why would I give those jury findings weight as to whether they're entitled to a limitation of liability?

MR. HAMMER: Because if you recall, in a limitation of liability case, it's a split procedure. First Mr. Newman has to establish the liability of the defendant—of Consol, rather, to him. He has proven in State Court that consol was negligent, its vessels were unseaworthy, that those conditions were the legal cause of his injuries. His injuries are liquidated there in an amount that exceeds the limitation fund. He has proven all of those things. A jury has found them. So once that happens, it then comes to Consol, who bears the burden of proof on this, to prove that they are without privity or knowledge of the conditions that injured Mr. Newman. So my thought—

THE COURT: I take it you still contest liability. Is that it?

MR. MILLER: That's correct, Your Honor, and that has been stipulated to.

THE COURT: What did you give up? When you gave up your right that nothing would be res judicata, what were you giving up?

MR. HAMMER: I was giving up the right, which Mr. Newman did not have and could not have, to have a State Court say, "We are determining the right to Consol to limit the liability." The State Court has done no such thing. We didn't ask the State Court to do that.

THE COURT: I don't interpret the stipulation to be limited to that.

MR. HAMMER: May I know how you interpret the limitation, please?

THE COURT: I'm not going to interpret it officially until we go through your briefs, but my impression is that's not what was meant by the stipulation

MR. HAMMER: I was going to—

THE COURT: We're going to issue some kind an order on your motion and we'll deal with the reasoning behind it then, but for purposes of setting a pretrial schedule, I would assume that I'm not going to do that, that I'm not going to adopt the State Court findings. For purposes of setting a schedule, if I decide otherwise, I can modify it.

MR. HAMMER: You will issue an order to that effect?

THE COURT: Sure. I want to give you the chance to go before the Circuit, Mr. Hammer.

Okay. Now let's talk about what we're going to do scheduling wise, and I guess, Mr. Miller, you will be going first. Or I guess it's Mr. Hammer who as the claimant will have to prove liability first.

MR. MILLER: Yes.

(Adjournment at 4:05 PM.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

MARILYN BROWN
Marilyn Brown, Official Reporter

Jury Answers to Special Interrogatories

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. G.D. 90-00980

SPECIAL INTERROGATORIES

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATION COAL COMPANY,
a corporation,

Defendant.

SPECIAL INTERROGATORIES

1. WAS THERE ANY NEGLIGENCE UNDER THE JONES ACT ON THE PART OF THE DEFENDANT WHICH WAS A CAUSE IN ANY PART WHATSOEVER, NO MATTER HOW SMALL, IN BRINGING ABOUT PLAINTIFF'S INJURIES?

YES ✓ (11) NO ___ (1)

2. WAS THERE ANY UNSEAWORTHINESS OF THE VESSELS OR THE LEAVING LINE WHICH WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES?

YES ✓ (12) NO ___ (0)

IF THE ANSWERS TO QUESTIONS NO. 1 AND NO. 2 ARE "NO", YOU SHOULD NOT PROCEED ANY FURTHER. HOWEVER, IF THE ANSWERS TO EITHER QUESTIONS NO. 1 OR NO. 2 ARE "YES", PLEASE PROCEED TO QUESTION NO. 3.

3. WAS THERE ANY NEGLIGENCE ON THE PART OF THE PLAINTIFF WHICH CONTRIBUTED, IN WHOLE OR IN PART, TO HIS OWN INJURIES?

YES ✓ (10) NO ___ (2)

4. IF THE ANSWER TO QUESTION NO. 3 IS "YES", BY WHAT PERCENTAGE DID THE PLAINTIFF'S NEGLIGENCE CONTRIBUTE TO HIS OWN INJURIES?

11.83%

5. WHAT AMOUNT OF DAMAGES, IF ANY, EXPRESSED IN DOLLARS, DID PLAINTIFF SUSTAIN AS THE RESULT OF THE ACCIDENT ON THE 27TH DAY OF APRIL, 1989?

$1,327,000.00.

FOREPERSON: s/ MARY YVONNE YOCHUM
DATE: November 25, 1991

Order of January 28, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

O R D E R

AND NOW, this 28th day of January, 1991, upon consideration of Claimants' Motion to Vacate or Dissolve Injunction and to Stay filed in the above captioned matter on January 18, 1991, and upon further consideration of Complainant Consolidation Coal Company's response thereto,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1990, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge No. MC 1029 shall be lifted to allow further prosecution of the suit filed by George and Suzanne Newman in the Court of Common Pleas of Allegheny County, No. GD 90-00980, upon the filing with this Court of the following stipulations by claimants:

1. that claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding;

2. that Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding; and

3. that the issue of valuation of the limitation fund shall remain an issue to be resolved by this Court.

Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 758 (2d Cir. 1988); *Langnes v. Green*, 282 U.S. 531, 540-42 (1931). This Court finds that the stipulations submitted by claimants in their motion do not fully satisfy these requirements. The stay imposed by this Court on July 20, 1990, shall be continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action. Claimants' request that this Court stay the present action is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Order of February 1, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability.

O R D E R

AND NOW, this 1st day of February, 1991, upon consideration of the Stipulation of Claimants and their Counsel filed in the above captioned matter on February 1, 1991,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1991, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge Number MC 1029, is hereby LIFTED to allow further prosecution of the suit filed by Claimants, George and Suzanne Newman, in the Court of Common Pleas of Allegheny County at No. GD 90-00980. The stay imposed by this Court on July 20, 1990, is continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action.

AND, it appearing to the Court that no further action is contemplated by this Court at this time,

IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.

Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if this order had not been entered.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Supreme Court, U.S.
FILED
FEB 26 1998
CLERK

No. 97-1234

In The

Supreme Court of the United States

October Term, 1997

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the district court in an action for exoneration from or limitation of liability err in undertaking an independent review of the evidence on the issues of exoneration and limitation notwithstanding findings of liability of a state court jury, where Petitioner expressly and voluntarily stipulated that all such issues would be litigated in the subject proceeding and that no aspect of the state court judgment would be raised as *res judicata*?

RESPONDENT'S RULE 29.6 STATEMENT

There are no subsidiaries which are not wholly owned by Consolidation Coal Company. The following are parent companies of Consolidation Coal Company:

Rheinbraun US GmbH

Rheinbraun AG

RWE AG

DuPont Energy Company

E.I. du Pont de Nemours and Company

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STATEMENT OF THE CASE

Petitioner, George Newman ("Newman"), the Claimant in the present action, and Suzanne Newman, his wife (also an original claimant, whose claim was later withdrawn), filed an action against Respondent, Consolidation Coal Company ("Consolidation") in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 90-00980 ("state court action") in January 1990. In their Complaint, the Newmans sought recovery for personal injuries that Mr. Newman allegedly sustained on April 27, 1989 while in the employ of Consolidation pursuant to the Jones Act, 46 U.S.C. § 688, and the doctrine of unseaworthiness under the general maritime law. Mrs. Newman asserted a claim for loss of spousal consortium.

On July 20, 1990, Consolidation commenced the within action in the United States District Court for the Western District of Pennsylvania seeking exoneration from or limitation of its liability with respect to the Newmans' state court action under the provisions of the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.* and Fed. R. Civ. P. Supp. R. F. At the time of filing its Complaint, Consolidation deposited with the district court a bond in the amount of $120,000, in accordance with 46 U.S.C. § 185, representing the value of Consolidation's interest in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Newman claimed to have been working at the time of his accident.

Upon filing of Consolidation's Complaint in the district court, and in order to protect the court's admiralty jurisdiction over this matter, said court, through the Honorable Alan N. Bloch, entered an Order on July 20, 1990 which, among other things, ordered that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the

> M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability be and the same hereby are stayed and enjoined. [Appx. 1a, 3a.]

By its application, Judge Bloch's order specifically enjoined any further prosecution of the state court action which the Newmans had previously filed.

After the parties had proceeded with discovery in the present action for approximately six months, the Newmans, on January 18, 1991, filed with the district court a Motion to Vacate or Dissolve Injunction and Stay requesting that the district court lift the stay that it had ordered on July 20, 1990 so as to allow the Newmans to pursue their Jones Act, unseaworthiness, and consortium claims in the state court action. In so requesting, the Newmans volunteered to stipulate that: (1) the district court had sole and exclusive jurisdiction of all issues relating to Consolidation's attempt to limit its liability in the present action; (2) no state court judgment would be *res judicata* as to any limitation fact or issue in the present proceeding; and (3) the Newmans' action would be confined to the state court proceeding. Appx. 4a-7a.

Citing established admiralty practice, Consolidation opposed the lifting of the stay in the present action, contending that the stipulations offered by the Newmans were insufficient to protect Consolidation's interests. Appx. 8a-24a. After receiving no opposition to Consolidation's contentions, on January 28, 1991 Judge Bloch ordered that the requested lifting of the stay would only be granted if the Newmans agreed to enter into stipulations which the district court deemed would adequately protect Consolidation's interest in the present action. Pet. 45a. A mere two days later the Newmans agreed and stipulated, *inter alia*, as follows:

> 1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption. [Appx. 25a.]

On February 1, 1991, the district court lifted the stay that it had imposed on July 20 of the previous year, allowing the Newmans to pursue their Jones Act, unseaworthiness and loss of consortium claims in state court. Pet. 47a.

In November 1991, after Suzanne Newman had withdrawn her claim, the state court action proceeded to trial and resulted in a jury verdict in favor of Newman in the amount of $1,327,000. The jury found that Consolidation was negligent under the Jones Act and that the vessel in question was unseaworthy and that Newman was 11.83 percent contributorily negligent. Pet. 43a. After both parties' cross-motions for post-trial relief were denied, the trial court entered an order molding the jury verdict to a damage award in favor of Newman in the amount of $1,244,519.50.

Both parties took cross-appeals to the Pennsylvania Superior Court where that court affirmed all appealed issues except the trial court's award of prejudgment interest in favor of Newman. After the parties were denied cross-applications for reargument before the Superior Court, Cross-Petitions for allowance of appeal to the Pennsylvania Supreme Court were also denied. On August 9, 1995, Newman petitioned this Court for Writ of Certiorari at docket number 95-240 on the issues of prejudgment interest and contributory negligence, which Petition was denied on October 10, 1995.

On June 15, 1995 Newman moved to have the present action returned to active status in the district court so that Consolidation's claims for exoneration from or limitation of liability could be litigated. That motion was granted on July 5, 1995. He then filed a Motion to Adopt the Findings of the Jury as the Findings of the Court urging that the district court adopt what he perceived to be the findings of the jury from the state court action. Appx. 26a. On August 4, 1995, the district court issued an order denying the Motion, which Consolidation had opposed. Pet. 34a.

On or about September 2, 1995 Newman filed with the Third Circuit Court of Appeals a Petition for Writ of Mandamus, and what he claimed was a protective appeal on September 1, 1995, each challenging the district court's refusal to adopt the jury findings in the state court action as binding determinations in the limitation claim of this case. Said appeal and petition were dismissed and denied, respectively on November 29, 1995. Newman petitioned for rehearing, which was also denied. On January 29, 1996 Newman petitioned this Court for Writ of Certiorari at docket number 95-1219, which was likewise denied on April 1, 1996.

The limitation/exoneration case was then tried in a bench trial before Judge Bloch on July 8, 1996.

On July 17, 1996 the district court issued Findings of Facts and Conclusions of Law ultimately concluding that Consolidation was entitled to exoneration from liability. Pet. 25a-33a. More particularly, the court concluded that Newman slipped and fell into the hold of Barge 1029, that the leaving line being utilized by Newman at the time of his accident had been cut, that the cutting of the leaving line occurred after Newman's accident and that therefore the condition of the leaving line could not have caused Newman's accident. Pet.

28a. Based upon these factual findings, the court held that Newman failed to prove that Consolidation was liable for negligence or that the vessel was maintained in an unseaworthy condition and that therefore Newman failed to carry his initial burden of establishing liability on the part of Consolidation. Pet. 32a. Accordingly, the court concluded that Consolidation was entitled to exoneration. Pet. 33a.

On appeal to the Third Circuit of Appeals, the district court decision was affirmed on August 17, 1997. Said decision was reported at 123 F.3d 126 (3d Cir. 1997). Pet. 1a. In particular, the Third Circuit held that Newman should be bound to his stipulation to waive *res judicata*[1] with regard to all issues of exoneration and limitation in the present proceeding, that Newman was not entitled to a jury trial in the present action, and that the district court did not err in its findings of fact or conclusions of law nor in its evidentiary rulings. Newman's Petition to the Third Circuit for Rehearing was denied on October 30, 1997.

---

1. In so doing, Newman waived both claim preclusion and issue preclusion. Pet. 12a n. 8.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT MERELY INVOLVES THE RE-EXAMINATION OF SPECIFIC FACTUAL MATTERS AS DETERMINED BY THE DISTRICT COURT AND AFFIRMED BY THE THIRD CIRCUIT COURT OF APPEALS. REVIEW OF THE PETITION IMPLICATES NONE OF THE RECOGNIZED BASES FOR THIS COURT GRANTING CERTIORARI.

With his Petition, Newman seeks to have this Court reverse the Third Circuit Court of Appeals' decision affirming the district court's ruling holding Newman to his stipulation to have *all issues* relating to Consolidation's Complaint for exoneration from or limitation of liability tried before the district court, and not to invoke *res judicata* with respect to any issue decided in the state court action.[2]

In support of the Petition, Newman invokes several of the traditional and recognized bases for this Court granting certiorari, including the decision of the Third Circuit purportedly conflicting with those of other circuits, Pet. 10, 13, 16-17 and with the United States Constitution, Pet. 16, federal statute, Pet. 16, and prior decisions of this Court. Pet. 14. If the Third Circuit decision was conflicting in *any one* of these areas there may be an appropriate basis for this Court to grant certiorari. However, the decision of the Third Circuit implicates none of the principles cited by Newman. Instead, the decision can be distilled to one fact — one that involves neither conflict of the

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2. While Newman raised several issues on appeal to the Third Circuit, it is only the effect of Newman's stipulation that is the subject of the Petition. *See* Pet. 7-8.

circuit courts nor the Constitution, federal statute nor prior decisions of this Court. That fact is Newman's stipulation. This case need not and should not be decided on any of these purported "conflicts." As correctly analyzed by the Third Circuit, this is a case for simply enforcing an agreement that Newman freely and without objection made, and on which the district court and Consolidation relied.

For purposes of the Petition, Newman's stipulation is the most important element of his claim, yet he devotes essentially no discussion to it, other than to say, effectively, that he entered into it yet it should be disregarded.

While Newman calls for resolution of an apparent conflict between the circuits on whether a claimant in a limitation action must stipulate to waive the *res judicata* effect of a state court decision on claims for exoneration as well as limitation, the Third Circuit, while noting an apparent conflict, Pet. 9a, expressly stated that its decision *would not and need not* involve it taking a side in the conflict:

> In this case it is not necessary for us to take a position on how far a claimant's stipulation must go. In other words, we need not decide whether a district court, as a condition of dissolving the injunction against the state court proceedings, may insist that the claimant waive the *res judicata* effect of the state court finding on the liability issue because Newman has not preserved his right to raise this issue.
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> * * *
>
> We therefore need not decide whether a claimant in a limitation action must waive the *res judicata* effect of the state court proceedings as to both limitation

> and exoneration issues in order to proceed in state court under the saving to suitors clause.

Pet. 10a-11a.

The Third Circuit made *no* determination as to the propriety of the district court's January 28, 1991 Order conditioning the lifting of the stay on Newman entering into specified stipulations. The fact that Newman did not seek to take an appeal of this ruling under 28 U.S.C. § 1292(a)(1) and, more importantly, that Newman did not even oppose the form of these stipulations, but instead immediately agreed and entered into them, was the basis for the Third Circuit ruling that Newman should be held to them. It didn't need to decide questions of conflict among the circuits or with the Constitution, federal statute or prior decisions of this Court.

Where no true conflict exists, certiorari is not appropriate. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). The Third Circuit decision is patently consistent with the rule of judicial interpretation that wherever possible, a court should not pass on questions of constitutionality if an alternative ground for the decision exists. *Alma Motor Company v. Timken-Detroit Axle Company*, 329 U.S. 129, 136 (1946); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 71-72 (1961). The Third Circuit decided the relevant issues presented to it in just this way.

The Petition then leaves for this Court merely to determine the factual issues concerning the stipulation, such as its interpretation, whether Newman waived any rights that he may have had to have the determinations of the state court made binding in the exoneration/limitation action, and whether he is judicially estopped from reneging on his stipulation. However,

individual factual determinations are decidedly inappropriate for review on certiorari. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984); United States Supreme Court Rule 10 ("A petition for a writ certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Therefore, the Petition should be denied.

II.

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD NEWMAN TO WHAT HE AGREED BY WAY OF HIS OWN VOLUNTARY STIPULATION.

With his appeal from the district court's denial of his Motion to Adopt the Findings of the Jury as the Findings of the Court ("Motion to Adopt the Findings of the Jury"), his appeal to the Third Circuit, and now, his Petition to this Court, Newman seeks to have the findings made by the jury in the state court action that Consolidation was negligent and that the leaving line in question or the vessel on which Newman worked was unseaworthy, made as binding determinations *of fact* in the present action in order to circumvent the stipulation into which he knowingly, willingly and voluntarily entered. Newman maintains that the district court's refusal to do so, and the Third Circuit's agreement with that refusal, resulted in a reexamination of the jury's findings in the state court action and a denial of a jury trial in this suit, both — purportedly — in violation of the Seventh Amendment to the United States Constitution. Pet. 15-16.

The practice used by the district court was correct and consistent with over 60 years of admiralty procedure established by this Court. First, the district court's issuance of an injunction

on July 20, 1990 against Newman pursuing claims outside of the present action was completely proper and consistent with admiralty practice with regard to limitation/exoneration proceedings. *See Gorman v. Cerasia*, 2 F.3d 519, 523 (3d Cir. 1993) ("If a ship owner facing potential liability for a maritime accident files a complaint seeking protection under the [limitation] Act, the district court is authorized to stay all proceedings against the owner."), *citing* 46 U.S.C. App. § 185; Fed. R. Civ. P. Supp. R. F(3). To the extent Newman wanted to pursue his state court action, he was required to enter into stipulations sufficient to protect Consolidation's interests as a vessel owner. *See, Ex Parte Green*, 286 U.S. 437, 438-40 (1932); *Langnes v. Green*, 282 U.S. 531, 540-44 (1931); *Complaint of Dammers & Vanderheide*, 836 F.2d 750, 755 (2d Cir. 1988). The district court conditioning the lifting of the stay it imposed on Newman entering into a stipulation to waive claims of *res judicata* as to limitation and exoneration issues was based on this established admiralty practice.[3]

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3. Due to its nature, this practice has been held in certain instances to involve inherently redundant proceedings and apparently inconsistent determinations. *See Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 405 (5th Cir. 1993) ("So where, as here, all of the claimants are so anxious to take advantage of the perceived magnaminity of South Texas [state court] juries that they are willing to stipulate essentially that they will submit to two trials — the state court trial followed by a substantially redundant federal limitation proceeding — this court is hard put to deny them. We must accede to this choice *if* it is accompanied by stipulations fully protecting [the vessel owner's] right to limit liability and agreeing to abide by an admiralty court determination of the right to limit."); *Texaco, Inc. v. Williams*, 47 F.3d 765, 769 (5th Cir. 1995) (stay ordered lifted where, *inter alia*, claimants "agreed to stipulate that the limitation court is not bound by any decisions by other courts on issues relating to limitation *and* exoneration."); *Port of Pasco v. Pacific Island Investigation Co.*, 324 F.2d 593, 598, 599 (9th Cir. 1963) ("[T]he district court was free to make findings and conclusions which might

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Barring Newman's request to have the stay lifted and agreement to enter into a stipulation to protect the interest of the vessel owner, the limitation action, including, Consolidation's claim for exoneration would be litigated before the district court. In such case, the district court sitting in admiralty, without a jury, *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-60 (1847), would have decided whether Consolidation had any liability to Newman, and if so, whether that liability should be limited. *Province and New York Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578, 595 (1883)[4]. In fact, Newman *did* petition to have the stay lifted so that he could proceed with his claims in state court, and apparently recognizing his obligation to stipulate to protect the interests of the vessel owner, Newman offered to stipulate that: (1) the district court would have sole and exclusive jurisdiction as to all limitation issues; (2) that no state court judgment could serve as *res judicata* as to any limitation fact or issue; and (3) that Newman would continue his action to the state court proceeding. In response to

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be expressly or implicitly inconsistent with the state court as a basis for the latter's decision on liability . . . It is nevertheless a permissible result in view of the stipulation of the parties, and the order entered pursuant thereto, dividing the decisional function between the two trial courts, each being given a free reign in the field assigned to it.")

Whether these redundancies or apparent inconsistencies *should* exist or be tolerated is of no moment for purposes of the present action insofar as Newman stipulated to such a result without presenting any timely opposition or challenge.

4. This is a two step process where if there is no finding of liability in the first instance, *i.e.*, exoneration, "there is nothing to limit." *Complaint of Port Arthur Towing M/V Miss Carolyn*, 42 F.3d 312, 317 (1995), *quoting* Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* 895 (2d ed. 1975).

Newman's request, Consolidation filed a response arguing that the stipulation of the Newmans was insufficient to so protect those interests. Appx. 8a.

After receiving *no opposition* from the Newmans, the district court conditioned its lifting of the stay on their stipulating to waive any claim of *res judicata* based upon a state court judgment, and that Consolidation would have the right to litigate all issues pertaining to its claims of limitation and exoneration before the district court. The Newmans dutifully and enthusiastically, filed such stipulation only three days later, again *without any reservation or objection*. Appx. 25a. In reliance on that stipulation, the district court lifted the stay that it had imposed. Newman subsequently pursued his state court claims and after exhaustion of all of his appeals (culminating with this Court's denial of Newman's Petition for Writ of Certiorari) moved to return to the district court on June 15, 1995. Upon the district court's grant of that motion, Newman — without missing a beat — sought from the district court a summary resolution of the case through an adoption by the district court of the jury's findings and a separate finding in favor of Newman in total. Appx. 26a.[5] Without so much as one word about the

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5. Apparently mindful of the stipulation that he entered into, Newman attempted to circumvent its conditions by denominating his Motion presented to the district court as to one to "Adopt the Findings of the Jury as the Findings of the Court." However, Newman's use of this specious terminology in order to assert *res judicata* was recognized by the district and circuit courts as being patently transparent and in complete contravention of the stipulation.

Moreover, in his Petition, Newman states that "the federal court is free to consider whether Consol had privity of knowledge of the conditions giving rise to the accident as a threshold matter to determining whether Consol may limit its liability." Pet. 19. This statement however, represents another inconsistent position taken

(Cont'd)

stipulation that he freely entered into and which enabled him to pursue claims in state court, Newman sought to completely ignore his obligations. The calculated manner in which Newman pursued resolution of the limitation action armed with what (for him) were favorable jury findings — all in disregard of his explicit stipulations — smacks of disingenuousness toward the district court, and of doubt whether Newman *ever* intended to be held to those obligations.[6] As noted above, when presented with constitutional questions, courts must endeavor to resolve the case in which they are presented on *non-constitutional* grounds where possible. Indeed, the present dispute does not involve decisions contradictory to the constitution or federal statute or prior decisions of this Court. It likewise does not involve conflicting decisions of circuit courts. Instead, as found by the Third Circuit, this case involves merely the factual determination of what Newman stipulated to and whether he should be bound to that stipulation. The Third Circuit correctly held that the district court did exactly what Newman agreed that it could and should do in the limitation/exoneration action.

Accordingly, while Newman argues that the district court erred in conditioning dissolution of the injunction on the various stipulations that Newman ultimately entered into, those

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by Newman and a retreat from the relief that he sought in his Motion to Adopt the Findings of the Jury, namely, a summary determination that Consolidation was *not* entitled to litigate even the issue of its "privity or knowledge," *i.e.*, limitation, based on the determinations made in the state court action. Appx. 28a.

6. Significantly, Newman's Motion to Adopt the Findings of the Jury was the *first* mention of his belief that the Seventh Amendment proscription on re-examination of jury findings may be implicated. He had never before raised this issue to the district court despite ample opportunity to do so.

stipulations, the requirement of which was based on established admiralty practice, were entered into voluntarily, without objection and at Newman's own request. Newman cannot be heard now to renege on those stipulations or complain that he was operating under some kind of duress or coercion. *See Acacia Vera Navigation Company, Ltd. v. Kezia, Ltd.*, 78 F.3d 211, 218-219 (5th Cir. 1996) (party cannot argue an issue on appeal in contravention of stipulation that it entered into where it has not presented objection or argument to be considered by district court.). Significantly, if Newman had an objection to the district court conditioning the lifting of the injunction that it had imposed, he could have immediately appealed that ruling. *See* 28 U.S.C. § 1292(a)(1); *see also Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995); *Gorman*, 2 F.3d at 523.[7]

To the extent that constitutional issues are implicated, as Newman has protested *only* since moving to have the district court resume its jurisdiction of the instant matter on June 15, 1995, any such rights that Newman claims have blatantly been waived by his own stipulation.

It is well-established that even constitutional rights may be waived if the waiver is voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Edwards v. Arizona*, 451 U.S. 477, 482-85 (1981). Whether the waiver was voluntary, knowing, and intelligent is to be determined from the facts and circumstances of a particular case. *Edwards*, 451 U.S. at 482. Waiver of a party's right to a jury trial may be effected in a variety of ways. It may be done expressly or impliedly. *Commodity Futures Trading Comm. v. Schor*, 478

7. Newman undoubtedly recognized the ability to file appeals to the Third Circuit from interlocutory orders with regard to these matters. He did so on December 18, 1992, which appeal was docketed at No. 92-3734 and on September 1, 1995, which appeal was docketed at No. 95-3491.

U.S. 833, 848-849 (1986). It may be done by conduct of the party. *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995), *citing, inter alia, Cooper v. Loper*, 923 F.2d 1045, 1049 (3d Cir. 1991) (participation in a bench trial constitutes waiver). All of these methods are presented by Newman's stipulation of January 30, 1991. It cannot be doubted that Newman's stipulation constituted a sufficient and binding waiver of any right that he may have had to have determinations made in the state court action bind the district court in this case, or any supposed right to a jury trial in the limitation/exoneration action or against a court's purported reexamination of jury findings. Specifically, it was *Newman* who moved in the district court to have the stay of the state court proceeding lifted, and who stipulated that he would waive any claim of *res judicata* based on that proceeding. It was *Newman* who stipulated that Consolidation would have the right to litigate "*all issues*" *relating to the limitation and exoneration proceeding.*

The issue of the necessity for and content of stipulations required for the admiralty court to lift the stay on the state court action was specifically presented in detail before the district court, prior to Newman entering into the stipulation — at least by Consolidation. Appx. 8a. Significantly, Newman never raised any Seventh Amendment issue, did not challenge Consolidation's position or the stipulation that the district court deemed necessary to permit the state court action to proceed, and voluntarily entered into that stipulation. Had Newman felt the stipulation required by the court was objectionable, he certainly could and should have challenged it then. Significantly, however, Newman raised *no* objection at that time. Since he raised no objection, the district court and Consolidation relied on his stipulation, agreeing to hold in abeyance the limitation/exoneration action that had been progressing toward trial, and allowing Newman to litigate his state court action. That concession allowed Newman to litigate his state court claims

through trial and appeals all the way to this Court only to have Newman, after that four year process, seek to renege on his stipulation and ask the district court to direct what he expressly agreed he would not request. Newman's assertion of constitutional and statutory rights, after having previously waived them, cannot now be asserted simply because he feels that the ultimate result is unjust to him. *See Carter v. Sea Land Services, Inc.*, 816 F.2d 1018, 1021 (5th Cir. 1987) ("Once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will.")

The Third Circuit also correctly considered Newman judicially estopped from claiming the stipulation he entered into was improperly required by the district court. Pet. 10a n. 6. Indeed, it is well-settled that judicial estoppel precludes a party from abusing the judicial process by taking inconsistent positions in the same litigation. *See United States v. Ruiz*, 73 F.3d 949 (9th Cir. 1996); *Ergo Science, Inc. v. Martin*, 73 F.3d 595 (5th Cir. 1996); *Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9*, 10 F.3d 700 (10th Cir. 1993); *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 360 (8th Cir. 1992). Newman's disregard of his own stipulation is precisely such a situation.

Newman's stipulation could not be more clear. When Newman stated that he would "*waive* any claim of *res judicata* based upon any judgment obtained in the state court proceeding[,]" (emphasis added), what was Newman waiving other than the potential claim that certain facts which may be relevant in the exoneration or limitation proceeding had already been adjudicated in the state court action by a jury and were thus binding in the present action?

When Newman agreed in his stipulation that Consolidation would "have the right to *litigate all issues* relating to its claims of limitation or exoneration of liability" in the limitation/

exoneration proceeding (emphasis added), what else was he agreeing to but to be subject to a bench trial on the merits of Consolidation's exoneration and limitation claims? The district court, in permitting the state court action to proceed, and Consolidation, in not opposing that ruling, relied on Newman's stipulation in these regards. As stated by the district court in its August 4, 1995 order denying Newman's Motion to Adopt:

> Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimant's stipulation when it agreed to litigate in a different forum.

Pet. 37a.

It is significant that the district court — which recognized the need for the stipulation, presided over its wording, and which lifted the stay on the state court action — so interpreted the effect of the stipulation. An appellate court should be reluctant "to disturb the district court's interpretation of a stipulation agreed upon by the parties during pretrial proceedings and approved by the court." *Risher v. United States*, 465 F.2d 1, 5 (5th Cir. 1972).

While Newman impressively sets forth the development of admiralty jurisdiction with regard to the saving to suitors clause and the Limitation Act, he devotes not a single word in his Petition to why he voluntarily entered the stipulation that is central to his claim, or its intended meaning, if that meaning is somehow different than its plain language.[8] In proffering the stipulation, Newman

8. Newman states in his Petition, "The Third Circuit has (Cont'd)

claims that he "chose not to take a permissive interlocutory appeal from the district court's order lifting the stay on the proceedings." Pet. 5. Newman disputes the Third Circuit's determination that by not taking an interlocutory appeal from an order "refusing to dissolve or modify an injunction," 28 U.S.C. § 1292(a)(1), he "has not preserved his right to raise this issue. Pet. 9a.

The circuit court's statement in this regard stems from Newman's argument to that court that when faced with the district court's order conditioning the lifting of the stay on the stipulation, Newman was powerless not to accede to the condition, instead being "forc[ed]" to enter into the stipulation and having "no choice but to sign on the dotted line." Appx. 31a-33a. *See also* Pet. 10a n.5. The court did not consider his objection to the district court "forcing" him to enter into the stipulation because he could have sought immediate appellate review of the order *and* did not "even object to the form of the stipulations[.]" Pet. 10a.

While Newman apparently claims that dismissal of his interlocutory appeal of the district court's denial of his Motion to Adopt the Findings of the Jury is inconsistent with requiring him to challenge the district court's order conditioning the lifting of the stay on certain stipulations, the orders were very different for appeal purposes. While the latter order was decidedly

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situationally converted permissive review into a mandatory appeal, and so required Newman to have been clairvoyant in predicting the district court's later interpretation of the stipulation." Pet. 20. In so stating, Newman *suggests* that the district court's "interpretation of the stipulation" was different than what he intended or its plain language. Yet, glaringly, Newman offers no insight or explanation as to what he intended by the stipulation that he freely and without objection entered into.

appealable as an order refusing to dissolve or modify an injunction and therefore immediately appealable, *Gorman*, 2 F.3d at 523; *Texaco, Inc.*, 47 F.3d 765 (5th Cir. 1995), the former order did not deal with any injunction (other than rejecting Newman's argument that the district court should ignore his stipulation), and was dismissed as not even being interlocutorily appealable as an order in admiralty determining the substantive rights and liabilities of the parties pursuant to 28 U.S.C. § 1292(a)(3).

Newman offered no opposition to Consolidation's brief in opposition to his motion to vacate or dissolve injunction and to stay. Instead, upon the issuance of the district court's order, Newman willingly, voluntarily and completely complied. To the extent that Newman challenges the district and circuit court's decision holding him to his stipulation, in failing to raise it before this appeal and, raising it for the first time in front of the district court, on July 19, 1995, he has waived his opportunity to do so. Instead of being "force[d]" to stipulate as noted in the court's order and having "no choice but to sign on the dotted line[,]" Appx. 32a-33a. Newman had ample choice to oppose Consolidation's brief in opposition, and to object to the court's order *and* to take an interlocutory appeal (*see* 28 U.S.C. § 1292(a)(1)). He did none of these.

Newman expressly stipulated that the district court would have exclusive jurisdiction for determining all issues related to Consolidation's Complaint for Exoneration From or Limitation of Liability and that *no* fact found by a jury in the state court action would serve as *res judicata* in the present case — a stipulation on which the district court and Consolidation relied. No other meaning has been or can be ascribed to the stipulation. For purposes of Newman's Petition, this case involves nothing more than the application of Newman's stipulation. While Newman suggests that he was simply waiting until the

appropriate time to challenge the district court's January 28, 1991 order conditioning any lifting at the previously imposed stay on certain stipulations[9] he did not appeal the order at that time (although could have), did not dispute Consolidation's argument on which it was based (Appx. 8a) did not challenge that district court's acceptance of that argument or in any way suggest that he believed the order was incorrect or improper. Instead he wholly complied with the terms of the order and did not look back until he realized the district court was going to hold him to his stipulation with its denial of his Motion to Adopt the Findings of the Jury over four years later.

The Petition is not about conflicting circuit court decisions or an unjustified departure from rights supposedly provided by the constitution, federal statute or prior decisions of this Court. It involves straight-forward application of Newman's clear agreement to relinquish those rights, assuming *arguendo* that they even exist in this context.

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9. "Newman chose not to take a permissive appeal from the district court's order lifting the stay on the proceedings.

* * *

Having now a final judgment Newman appealed to the Third Circuit." Pet. 5, 7.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF COURT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 20, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

ORDER

AND NOW, this 20th day of July, 1990, upon consideration of Consolidation Coal Company's ("Consol") Motion for Approval of Limitation Bond and Stipulation for Costs and for an order Directing Issuance of the Required Notice and for Issuance of an Injunction with respect to any and all losses, damages, or injuries occasioned or incurred by any person or resulting from an alleged accident involving George Newman, which occurred on or about April 27, 1989 while he was employed by Consol, and referred to in Consol's Complaint for Exoneration From or Limitation of Liability filed herein, and it appearing to the court that (1) the combined value of Consol's interest in the towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending was approximately $120,000.00, (2) the claims which have been or may be asserted against Consol may exceed the value of its interest in said towboat and barge and the freight then pending, and (3) Consol filed a Limited Bond of $120,000.00 plus interest and has further filed a Stipulation for Costs in the amount of $250.00, IT IS HEREBY ORDERED that the Limitation Bond is

approved; however, such approval is without prejudice to the due appraisal of Consol's interest in said towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending, if so Ordered, and that in the meantime, any party may apply to have the amount of the Limitation Bond increased or diminished as the Court may direct.

IT IS FURTHER HEREBY ORDERED that a notice in the form attached hereto as Exhibit "A" shall issue out of and under the seal of this Court, citing all persons, firms, and corporations who have or allege to have claims for any and all losses, damages, or injuries occasioned or arising out of the alleged accident involving George Newman which occurred on or about April 27, 1989, to file their respective claims with the Clerk of this Court or be forever barred, and to serve copies of said claims on Consol's attorneys, Thomas A. Smock, Esquire and Leonard Fornella, Esquire, on or before September 15, 1990, and to make due proof of their claims as this Court may hereafter direct, subject to the right of any such persons or concerns to controvert or question said claims, with liberty also to such claimants who have duly filed claims to answer the Complaint filed herein by filing an Answer with the Clerk of this Court on or before September 15, 1990.

IT IS FURTHER HEREBY ORDERED that pursuant to Local Admiralty Rule (g)(3), the aforesaid public notice shall be given by publication thereof in the *Pittsburgh Press,* published in Pittsburgh, Pennsylvania, and that such notice shall be published once a week for four successive weeks prior to the date fixed herein for filing claims.

IT IS FURTHER HEREBY ORDERED that not later than the date of the second publication, Consol shall mail or cause

copies of said notice to be mailed to every person or concern known to have made any claim against them or against the towboat M/V Elizabeth or Barge No. Me 1029, arising out of or connected with the aforesaid accident which allegedly occurred on or about April 27, 1989.

IT IS FURTHER HEREBY ORDERED that the institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

IT IS FURTHER HEREBY ORDERED that service of this Order shall be made by Consol or its designee.

s/ Alan N. Bloch
UNITED STATES DISTRICT JUDGE

APPENDIX B — CLAIMANT'S MOTION TO VACATE OR DISSOLVE INJUNCTION AND TO STAY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

CLAIMANTS' MOTION TO VACATE OR DISSOLVE INJUCTION AND TO STAY

Claimants, George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered in this case and to stay the prosecution of this case in this Honorable Court. In support thereof, Mr. and Mrs. Newman allege:

1. Mr. and Mrs. Newman seek to recover against Consolidation Coal Company under the Jones Act, 46 U.S.C. §688, and for breach of warranty of seaworthiness. Alternatively, Claimants seek to recover for negligence under Section 5(b) of the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §905(b).

2. Mr. Newman suffered severe personal injuries while working on Consol's vessels on or about April 27, 1989.

3. Mr. and Mrs. Newman filed suit against Consolidation Coal Company on January 17, 1990, in the Court of Common Pleas of Allegheny County, Pennsylvania, at GD 90-00980.

Appendix B

4. On or about July 20, 1990, Consol filed this action to limit its liability and obtained that same date an Injunction barring the Newmans from prosecuting their prior action in State Court.

5. In that same Injunction, the Court ordered that all claims must be filed on or before September 15, 1990, or in default thereof such claims be forever barred.

6. The Honorable Court's Injunction was duly and timely advertised by Consol and proof thereof filed.

7. No claimants other than Mr. and Mra. Newman have appeared. Therefore, this is a single claimant's case, Mrs. Newman's consortium rights being derivative of her husband's.

8. To obtain the Order Mr. and Mrs. Newman now request, Claimants and their counsel hereby stipulate, intending to be legally bound, (1) that this Honorable Court has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries; (2) Mr. and Mrs. Newman and Mr. Hammer also stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding; and (3) finally, Mr. and Mrs. Newman and Mr. Hammer stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania, cited in paragraph 3 above.

9. There will be no prejudice to Consol by the granting of this Motion:

Appendix B

(a) If Consol secures a defense judgment in State Court, the case is over without further requiring any action of this Honorable Court.

(b) If Mr. and Mra. Newman win a judgment less than the limitation fund in State Court, again this Honorable Court will not be required to take any action;

(c) If Mr. and Mrs. Newman obtain a judgment in State Court in excess of the limitation fund, all limitation issues will be decided in this Honorable Court.

10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

11. The valuable time and assets of this Honorable Court will be conserved if the Newmans' Motion is granted and the Injunction vacated or dissolved and the case stayed. This Honorable Court may well be spared any further proceedings in this case and the case may be removed from this Honorable Court's Docket without further action.

Appendix B

WHEREFORE, Claimants George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered on July 20, 1990, and to stay any further action in this Proceeding until after the termination of the proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania.

Respectfully Submitted,

s/ Paul L. Hammer
Paul L. Hammer
Attorney for Claimants

APPENDIX C — RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTON AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

AND NOW comes Complainant, Consolidation Coal Company (hereinafter "Consol") by and through its undersigned counsel, and hereby responds to the motion of Claimants, George Newman and Suzanne M. Newman, to vacate or dissolve injunction and to stay this proceeding, averring as follows:

RESPONSE TO MOTION

1. With respect to the averments contained in paragraph 1 of Claimants' motion, it is admitted that Claimants have filed a Complaint against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania (hereinafter "state court suit"), seeking to recover damages under the Jones Act, 46 U.S.C. Section 688, and also alleging the unseaworthiness of vessels. It is also admitted that Claimants have also filed a formal claim

in this proceeding on the same bases. However, it is denied that Claimants have asserted any affirmative claim for recovery based on negligence under Section 5(b) of the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 905(b) in their the state court suit, although such a formal claim has ostensibly been made by Claimants in this proceeding.

2. With respect to the averment contained in paragraph 2 of Claimants' motion, it is admitted that Mr. Newman was involved in an accident on or about April 27, 1989 while employed by Consol. The remaining averments contained in paragraph 2 of Claimants' motion are denied as stated.

3. With respect to the averments contained in paragraph 3 of Claimants' motion, it is admitted that Claimants have filed suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980, which was served upon Consol on January 26, 1990. Consol is without knowledge or information sufficient to form a belief as to the truth of Claimants' averment as to the date on which said suit was filed, and thus said averment is denied.

4. The averments contained in paragraph 4 of Claimants' motion are denied as stated. On July 20, 1990, Consol filed the instant action seeking both exoneration from or limitation of liability. It is admitted that on July 20, 1990, this Court entered an Order in this action. However, the terms of that Order speak for themselves, and thus no response to Claimants' attempt to paraphrase said Order is required.

5. With respect to the averments contained in paragraph 5 of Claimants' motion, Consol avers that the terms of this Court's Order of July 20, 1990 speak for themselves, and thus

no response to Claimants' attempt to paraphrase said Order is required.

6. With respect to the averments contained in paragraph 6 of Claimants' motion, it is admitted that Consol duly and timely published, served and/or filed all advertisements, notices, proofs and other documents or pleadings required by the statutes, orders, rules and/or regulations applicable to this action.

7. The averments contained in paragraph 7 of Claimants' motion are admitted in part and denied in part. It is admitted that no claimants other than the Newmans have filed formal claims in this action. However, it is denied that Mrs. Newman has any legally cognizable claim for derivative consortium rights.

8. Consol avers that no response is required to the averments contained in paragraph 8 of Claimants' motion.

9. Consol avers that no response is required to the averments contained in paragraph 9 of Claimants' motion. In the event a response is deemed to be required, then Consol avers that it will be prejudiced by the granting of this Consol's action herein is not only for limitation but also for exoneration from liability, and further action may be necessary on the exoneration claim.

10. Consol avers that no response is required to the averments contained in paragraph 10 of Claimants' motion.

11. The averments contained in paragraph 11 of Claimants' motion are denied as stated.

Appendix C

MEMORANDUM OF LAW IN RESPONSE TO CLAIMANTS' MOTION

Claimants' motion to vacate or dissolve injunction and to stay is actually two motions, and Consol will hereinafter discuss the relative merits of these motions separately.

Claimants filed an action against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980 (state court suit), which was served on Consol on January 26, 1990. Claimants allege in their state court suit that George Newman was a seaman and that he was injured after being involved in an accident on or about April 27, 1989 while employed by Consol.

On July 20, 1990, Consol filed the instant action seeking exoneration from or limitation of liability with respect to Mr. Newman's accident of April 27, 1989, pursuant to the provisions of 46 U.S.C. Sections 181, et seq. At that time, Consol also filed an appropriate Limitation Bond in the amount of $120,000.00, representing the aggregate value of Consol's interests in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Mr. Newman claims to have been working at the time of his accident.

Upon the filing of Consol's Complaint herein, and in order to properly protect this Court's admiralty jurisdiction over this matter, this Court entered an Order on July 20, 1990 which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising

> out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

Thus, this Court's Order of July 20, 1990 effectively enjoined any further prosecution of the state court suit which Claimants had filed previously.

Consol subsequently published all required notices and advertisements, and filed all required pleadings and proofs in accordance with the applicable statutes, orders, rules and regulations governing actions for exoneration from or limitation of liability. Thereafter, the only claim filed in this proceeding was one filed on behalf of the Newmans, Claimants herein. Claimants now move this Court to vacate or dissolve the stay of July 20, 1990 so that they may proceed with the prosecution of their state court suit. Claimants have also asked this Court to enter a stay as to all further proceedings *in the instant action* wherein Consol seeks exoneration from or limitation of liability, pending final resolution of the state court suit.

I. *Claimants' Motion to Vacate or Dissolve Injunction*

In *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and in *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932), the Supreme Court announced that when a petition for exoneration from or limitation of liability was pending within the admiralty jurisdiction of a federal court, and where the only claim in the limitation proceeding was filed by a party who had previously filed a suit in a state court, then the federal district court should dissolve its stay or injunction as to the state court proceeding, but *only if* certain requirements were first met.

Appendix C

Subsequent to the *Green* decisions, various federal courts attempted to define precisely the factors which a claimant must first meet before the stay or injunction as to the state court proceeding could be lifted. The result of those decisions was the development of a rule requiring a claimant to file a series of stipulations when seeking to lift a stay. These stipulations were summarized by Professors Gilmore and Black in *The Law of Admiralty,* Second Edition (1975), at pages 871-872, as follows:

> The procedure which has been worked out under the *Green* cases is as follows: a single claim plaintiff who wishes to prosecute a common law action after the shipowner has filed a petition for limitation must
>
> a) file his claim in the limitation proceeding;
>
> b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;
>
> c) consent to waive any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court;
>
> d) concede petitioner shipowner's right to litigate all issues relating to limitation in the limitation proceeding.

(Citations omitted). *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp. 609, 611 (M.D. La. 1982); *S & E Shipping Corp. v. Chesapeake and Ohio Railway Company,* 678 F.2d

636, 643 (6th Cir. 1982); *Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983); *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985); *Valley Line Company v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

All of the courts which have addressed this issue are in uniform agreement that stipulations a), b), and d), above, are absolutely necessary before a stay of other proceedings may be lifted. Admittedly, however, there is a question as to the necessity of requirement b), that being that a claimant concede the sufficiency of the amount placed in the limitation fund. The split of authority with regard to this factor will be discussed more fully below, after Consol discusses whether the stipulations which have been made by Claimants herein at least satisfy the other three requirements.

Requirement (a) — File a Claim in the Limitation Proceeding

Consol concedes that Claimants have filed a formal claim in this action with respect to Consol's Complaint seeking exoneration from or limitation of liability, and therefore Claimants have met this requirement.

Requirement (c) — Consent to Waive any Claim of Res Judicata Relevant to the Issue of Limited Liability Based on any Judgment Obtained in the State Court

In paragraph 8 of their motion, Claimants and their counsel have agreed to "stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding." Although this stipulation may seem to satisfy the required res judicata waiver on first blush, Consol submits that a closer reading suggests that the stipulation, as worded, does not satisfy the requirement.

Appendix C

In the above regard, Claimant's stipulation only concedes that no state court judgment will be asserted as res judicata as to any "limitation fact or issue" in the limitation proceeding. However, the applicable decisions on this issue generally require that a claimant stipulate that "*no res judicata arguments* will be made based upon any state court judgment. " *Complaint of Midland Enterprises, Inc.*, 886 F.2d 812, 814 (6th Cir. 1989) (emphasis added). *See also, In Re Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (2d Cir. 1947) where the court required the claimant to waive any claim of res judicata relevant to the issue of limited liability and based on any judgment obtained in the state court action.

Consol is not uncertain as to what Claimants mean or intend when they limit their res judicata waiver to any "limitation fact or issue". While not intending to engage in semantical gymnastics, Consol nevertheless would suggest that Claimants' attempt to restrict their stipulation regarding res judicata only to "limitation facts or issues" is too narrow in the face of the decisional authorities which require a waiver of *any* claim of res judicata with respect to *any* issue relevant to the proceeding. Furthermore, Consol has sought both an exoneration from or a limitation of its liability in this action. To the extent Claimants' stipulation only applies to "limitation facts or issues", but not to issues relative to exoneration, then it does not properly protect this Court's admiralty jurisdiction over all issues in this proceeding.

Thus, to the extent that Claimants' stipulation is an attempt to waive res judicata, but only as to *certain* issues which may arise in this proceeding, then the stipulation is unduly narrow, and does not comport with the required language necessary to lift the stay as to Claimants' state court suit.

Appendix C

Requirement (d) — Concede Consol's Right to Litigate all Issues Relating to Limitation in the Limitation Proceeding

Claimants have stipulated in paragraph 8 of their motion that this Court "has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries." Generally speaking, this stipulation would appear to satisfy the requirement necessary to protect this Court's admiralty jurisdiction to decide any and all issues in this proceeding. However, the stipulation does not specifically concede that Consol will have the continuing *right* to litigate any and all issues relative to this proceeding; but merely that this Court will have sole and exclusive jurisdiction over those issues. Additionally, the stipulation does not recognize that Consol seeks herein both an exoneration from or a limitation of its liability. If this Court were to formally and affirmatively interpret Claimants' stipulation as conceding that Consol will continue to have the *right*, following the lifting of the stay, to litigate any and all issues relative to exoneration or limitation solely and exclusively within this Court, then this particular requirement could be satisfied.

Requirement (b) — Concede the Sufficiency in Amount of the Stipulation

Commensurate with the filing of its Complaint herein, Consol filed an Affidavit of Value and a Limitation Bond securing the value of the M/V Elizabeth and Barge No. MC 1029 as an alternative to tendering the vessels themselves. The limitation fund as to those vessels has been offered at the combined aggregate value of $120,000.00. Part (b) of the generally quoted four part test set forth in *Gilmore and Black*, above, would therefore require Claimants herein to concede

that the $120,000.00 value of the vessels in the limitation fund is sufficient and proper. Claimants have not made any such stipulation or concession in their motion.

Consol candidly admits, however, that various district and circuit courts are split in their determination of whether this concession is absolutely required before a stay of a state court action may be lifted. In that regard, certain courts addressing this issue have cited generally the four part test set forth in *Gilmore and Black* as being required in its entirety. *See e.g., S & E Shipping Corp. v. Chesapeake and Ohio Railway Company, supra*; *Jefferson Barracks Marine Service v. Casey, supra; Valley Line Company v. Ryan, supra;* and *In Re Red Star Barge Line, Inc., supra.* More specifically, in *Complaint of Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla. 1985), the district court, when lifting its stay, specifically ordered the claimant to file a statement conceding the sufficiency and amount of the stipulation for value filed by the shipowner in the limitation action. Thus, a literal reading of the above decisions would indicate that Claimants' stipulation herein lacks the necessary concession regarding the sufficiency of the value of the limitation fund herein, and would therefore not support their request to lift the stay.

On the other hand, there are number of decisions which discuss in depth this particular requirement, and have rejected the reasoning that a claimant must stipulate to the value of the limitation fund before a stay may be lifted. *See, e.g., Complaint of Midland Enterprises, Inc., supra.; In Re Mr. Wayne,* 729 F.Supp 1124 (E.D. La. 1989); *Kattelman v. Otis Engineering Corp.*, 701 F.Supp. 560 (E.D. La. 1988); *Complaint of North Lubec Manufacturing and Canning Company,* 647 F.Supp. 1132 (D. Me. 1986).

However, it is important to not that even in those decisions holding that a claimant need not stipulate to the value of the limitation fund, nevertheless, those courts have generally required that the other stipulations which the claimant did make include a concession, generally or specifically, that the valuation issue remained exclusively an admiralty question and was reserved for determination by the federal court in the limitation proceeding. *See, e.g., Complaint of Midland Enterprises, Inc., supra.* at 817, where the court accepted the claimant's contention that she need not stipulate to the value of the limitation fund itself, but must concede the exclusive right of the district court to determine value. *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp 609, 612 (M.D. La. 1982) ("the determination of the amount of the fund to which [liability] will be limited are hereby specifically reserved to this Courts); *Complaint of Cannon,* 487 F.Supp 26, 28 (S.D. Fla. 1980) ("the value of the vessel can be finally determined when, and if, this Court is presented with the limitation of liability issue.).

In the instant action, Claimants have not conceded the sufficiency of the value of the limitation fund offered by Consol. Therefore, if this Court accepts the reasoning of those decisions which require Claimant to specifically make such a concession before the stay will be lifted, then obviously Claimants herein have not complied with their requirement and the stay cannot be lifted.

Alternatively, in the event this Court should, after review of the applicable authorities, favor the reasoning of those decisions which have not required a stipulation as to the value of the limitation fund before lifting the stay, then Claimants herein must nevertheless concede, in the stipulations which

they do make, that the exclusive right to determine the sufficient and proper value of the limitation fund lies exclusively with this Court.[1] Claimants herein have not specifically conceded that any and all issues regarding the proper valuation of the limitation fund or of the M/V Elizabeth and Barge No. MC 1029 are reserved exclusively for determination by this Court. However, Claimants have offered a stipulation that this Court has sole and exclusive jurisdiction over any and all issues relating to Consol's attempt to limit its liability. If this Court were to formally and affirmatively construe that stipulation in broad fashion so as to include a concession by Claimants that all valuation issues are also reserved for exclusive determination by this Court, the proferred stipulation may be sufficient.

Response to Claimants' Third Stipulation

The third stipulation which Claimants and their counsel make in paragraph 8 of their motion is that they "stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania". Consol is currently not certain as to the exact meaning or intent of this particular stipulation, since, on its

1. As this Honorable Court may recall, Claimants herein previously challenged the value of the limitation fund insofar as the number of vessels to be included was concerned. A hearing on Claimants' motion in that regard was held before this Court on December 21, 1990, after which Claimants' motion to increase the value of the fund by including the values of other barges in Consol's empty fleet was denied. However, it is to be noted that under Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Claimants may still challenge the aggregate $120,000.00 value which has been placed on the M/V Elizabeth and Barge No. MC 1029, by requesting an appraisal of those two vessels.

face, it does not appear to relate to any of the stipulations required by the authorities discussed above. However, if this stipulation is an offer by Claimants that they will not institute or pursue any other proceedings against Consol in any other court or forum, then the offer would be proper, since this Court's stay should *only* be lifted, if at all, to allow Claimants to pursue their previously filed *state court suit,* but *not* to allow for the filing of or processing of any other claims or actions.

On the other hand, in the event this stipulation is an attempt to suggest that Claimants are only agreeing to proceed with their state court suit, but are contesting whether they have any further obligation to continue to proceed in the instant exoneration or limitation of liability action, then Consol would suggest that this stipulation is an improper attempt to restrict or confine these proceedings. As the Court will note from a review of the various decisions discussed above, the lifting of this Court's stay against Claimants' state court suit *does not* in any manner act as a dismissal of the instant action or otherwise moot this action. This exoneration from or limitation of liability action will still remain viable and must eventually be resolved and decided.

Even if This Court Should Vacate or Dissolve its Style It Should Only do so in Limited Fashion

In the event this Court should decide, upon proper stipulation from Claimants, that the stay as to Claimants' state court suit should be vacated, dissolved or lifted, the blanket stay may not be lifted in its entirety. In that regard, the stay Order of July 20, 1990 applies to any and all suits, actions or legal proceedings against Consol or the involved vessels arising out of or connected with Mr. Newman's alleged accident of April 27, 1989. This Court's

authority to lift its stay only extends to allowing a single claim Claimant to pursue a previously filed state court action involving the same incident. It does not, however, allow for the lifting of the stay in order to permit the filing or processing of any other claims by a claimant or any other person. Therefore, in the event this Court should decide to lift its stay herein, its Order should be crafted *only* for the limited purpose of allowing Claimants' state court suit to proceed.

Secondly, even as to the lifting of the stay to allow Claimants' state court suit to proceed, this Court should allow the stay to continue in effect against the entry of any judgment against Consol in Claimants' state court suit, and as to any consequent enforcement of any such judgment, pending the outcome of this proceeding for exoneration from or limitation of liability. *See, e.g., In Re Mr. Wayne, supra,* at 1130, where the court ordered the stay lifted to allow the prosecution of the claimant's state court action, but continued the stay in effect against entry of judgment and consequent enforcement of recovery pending the outcome of the limitation proceeding. *See also, Complaint of Dammers & Vanderheide,* 660 F.Supp. 153, 160 (S.D. N.Y. 1987), *aff'd,* 836 F.2d 750 (2d Cir. 1988). The reason for continuing the stay against the entry and enforcement of any judgment against Consol in the state court suit is to protect this Court's sole and exclusive admiralty jurisdiction over any and all issues relevant to exoneration from or limitation of liability.[2]

II. *Claimant's Motion to Stay the Instant Proceeding*

As indicated above, Claimants have not only moved to lift the stay against their pending state court action, but have also

2. This Court may allow the entry of a defense judgment against Claimants and in favor of Consol in the state court suit.

moved this Court to stay the instant proceeding until after the termination of their state court suit.

Gilmore and Black suggest, at page 872, that where a federal court lifts its stay as to a state court suit, "the admiralty court dissolves or modifies its Section 185 injunction to allow the civil action to proceed, meanwhile holding the limitation proceeding in abeyance until the result of the civil action is known." Some district courts, when lifting their injunctions against state court actions, have temporarily closed their limitation of liability files, without prejudice, pending a request to re-open following the conclusion of the state court proceeding, or have otherwise held in abeyance any outstanding motions and pretrial matters pending resolution of the state court proceedings. *See, Kattelman v. Otis Engineering, Corp., supra; In Re Mr. Wayne, supra; Complaint of Tropigas Carriers, Inc., supra.*

Nevertheless, Consol is not aware of any authority which affirmatively *requires* this Court to stay the instant action if this Court should allow Claimants to proceed in state court. In that regard, it is to be noted that, in *Complaint of Cannon, supra,* at 29, the court lifted its injunction as to the state court proceeding and stayed its own limitation action. However, that court also ordered that, in the interim, the court "may take action on those matters that are not subject to determination by the state court."

Consol would respectfully submit that, ultimately, the decision as to whether to impose a stay on all further proceedings in the instant action rests solely within the discretion of this Court. The general rule is that the pendency of an action in a state court is no bar to proceedings concerning the same or a similar matter in a federal court having jurisdiction. Nevertheless,

many courts follow the rule that a federal district court has discretion to stay proceedings on its own docket pending the outcome of a similar suit instituted in a state court. The Supreme Court recognizes this discretion; however, has indicated that its exercise is justified only in exceptional circumstances. *See,* discussion at *Federal Procedure, L.Ed.*, Volume 1, Section 1:558. Factors affecting the decision to grant or deny a stay include, among others, the order in which jurisdiction was obtained, the similarities of the parties, the similarity of issues, avoidance of piecemeal litigation and the convenience of the forums. *See generally, Federal Procedure, supra,* at Sections 1:559-1:564.

It is to be noted herein that, while the parties are the same and the issues may appear to be similar on their face, the legal theories and burdens of proof are different in this action as opposed to those in Claimants' state court suit. It should also be noted that, although it is true that in the event Consol is ultimately successful in obtaining a defense verdict in the state court suit, no further action in this proceeding would be necessary; nevertheless, in the event of a jury award in favor of Claimants in state court, the parties would still return to this Court for a determination of whether Consol should be exonerated from and/or limited with respect to its liability. Under these circumstances, this Court may wish to continue with this proceeding presently, rather than waiting to proceed in the future.

Appendix C

Respectfully submitted,

POLITO & SMOCK, P. C.

By s/ Leonard Fornella
Leonard Fornella

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(412) 392-3500

Attorneys for Complainant,
Consolidation Coal Company

APPENDIX D — STIPULATION OF CLAIMANTS AND THEIR COUNSEL

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

STIPULATION OF CLAIMANTS AND THEIR COUNSEL

Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:

1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.

2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

s/ Paul L. Hammer

Paul L. Hammer
Attorney for Claimants

APPENDIX E — CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

AND NOW, comes Claimant, George Newman,* (Mr. Newman) by his attorney, Paul L. Hammer, Esquire, and moves this Honorable Court to adopt the findings of the jury of the Court of Common Pleas of Allegheny County as the findings of this court. In support thereof, Mr. Newman alleges:

1. Complainant, Consolidation Coal Company (Consol) filed this admiralty action to limit its liability, 46 U.S.C. §§181, *et. seq*, on or about July 20, 1990, some six months after Mr. Newman filed a tort personal injury action on the grounds of unseaworthiness and Jones Act, 46 U.S.C. §688 *et. seq*, negligence against Consol, in the Court of Common Pleas of Allegheny County, Pennsylvania at G.D. 90-00980.

2. This court modified the injunction and administratively dismissed this action to accommodate Mr. Newman's right to a jury trial in the state court on or about February 1, 1991.

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* Suzanne Newman was dropped from the case during the state court proceedings.

Appendix E

3. The jury found in answers to special interrogatories *inter alia* that Mr. Newman's injuries were the legal result of Consol's negligence and the unseaworthiness of its vessels. In addition, the final judgment set damages in excess of $1,000,000.00. A true and correct copy of the jury's answers to special interrogatories is attached hereto as Exhibit 1.

4. Consol's Request for Jury Instruction No. 8 submitted for the jury's decision the factual finding of what knowledge it had or reasonably should have had. Request No. 8 is quoted here:

> The definition of negligence requires the defendant to only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words, the defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

A true and correct copy of Consol's Request for Jury Instructions is attached hereto as Exhibit 2.

5. The Honorable Patrick McFalls, the state trial judge, granted Consol's said request for instruction No. 8. He told the jury:

> Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular

> circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line.

(Transcript, p. 760). A true and correct copy of Judge McFalls' complete charge is attached hereto as Exhibit 3.

6. Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request.

7. The Superior Court affirmed the verdict and the Supreme Court of Pennsylvania denied Petitions for Allowance of Appeal on May 11, 1995.

8. On or about June 29, 1995, Consol conceded:

> Complainant concurs with Claimant in his assertion that, with the exception of issues concerning post-judgment interest and litigation costs relative to the State Court proceeding, said matter is effectively concluded for purposes of the within litigation.

(Complainant's Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference filed on or about June 29, 1995, page 2.)

9. There is now a state court judgment, which Consol conceded on or about June 29, 1995 is final.

10. A decision to reexamine the facts found by the jury or the judgment of the Pennsylvania courts in this case would necessarily require a determination of the Federal constitutional questions, *inter alia,* listed below.

11. The Seventh Amendment to the Constitution of the United States of America precludes a reexamination of the facts found by the jury in these circumstances. No court has jurisdiction to redetermine those facts found by the jury.

12. The Pennsylvania judgment is entitled to full faith and credit via Article IV, Section I of the Constitution of the United States of America, which Congress has applied to the Federal Courts, 28 U.S.C. §1738.

13. Consideration of federalism and comity bar an intrusion by the lower federal courts into the judgment of the courts of the Commonwealth of Pennsylvania in this controversy.

14. Additionally, sound judicial economy would not be served by a wasteful second trial on the established facts in this lengthy litigation.

15. No federal court other than the Supreme Court of the United States has jurisdiction to review the judgment of the courts of the Commonwealth of Pennsylvania in this dispute. Hence, this Honorable Court lacks such jurisdiction.

16. Throughout the course of the litigation in state court Consol repeatedly and consistently argued that it did not inspect the rope that failed, causing Mr. Newman's injuries. A true and correct copy of that part of Consol's brief in Support of Its Motion for Post-trial Relief is hereto attached as Exhibit 4.

Appendix E

17. The rope involved in this case was on the open deck of Consol's vessel and easily could have been inspected.

18. The jury's finding that Consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.

19. Consol waived the protection of this court's injunction by actually litigating and submitting the knowledge issue to the jury for decision. Consol's claim of lack of privity and knowledge is inextricably intertwined with the merits of the state court judgment and review of the state court's decision is forbidden.

20. A decision to reject the jury's findings in this federal litigation would necessarily deprive Mr. Newman of his right to a jury trial which was the essential purpose for the February 1, 1991 modification of the injunction through application of the "saving to suitors" clause U.S.C. §1333.

21. Consol is judicially estopped from arguing to this Honorable Court that it reasonably inspected the rope involved after it maintained the opposite position throughout the Pennsylvania courts.

Respectfully submitted,

s/ Paul L. Hammer
Paul L. Hammer
Attorney for Claimant

APPENDIX F — EXCERPTED BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-3434

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER OF THE MOTOR VESSEL ELIZABETH and as CHARTERER OF BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

BRIEF FOR APPELLANT

APPEAL OF GEORGE NEWMAN, APPELLANT FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 17, 1996

CIVIL ACTION NO. 90-01206

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* * *

Appendix F

B. IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN EFFECTIVELY REQUIRING MR. NEWMAN TO STIPULATE TO A RETRIAL OF HIS JONES ACT AND UNSEAWORTHINESS CASE AS A CONDITION PRECEDENT TO LIFTING THE STAY FORBIDDING HIM TO PROSECUTE HIS STATE COURT CASE.

Mr. Newman was confronted with an *ex parte* federal injunction forbidding him to proceed with his state court *in personam* action. In January 1991, he faced the Hobson's choice of losing his common law rights altogether or executing the stipulation the court ordered. This Court held an order refusing to dismiss a limitation action was not appealable. *In Re Bave's Petition,* 314 F.2d 335 (3rd Cir. 1963). The Court held in 1987 only orders determining the merits of the petition or defenses were appealable. *Kingstate Oil v. M/V Green Star,* 815 F.2d 918 (3rd Cir. 1987).

On appeal from final judgment, an appellate court may ordinarily consider all prior rulings of the trial court. *United Coal Companies v. Powell Const. Co.,* 839 F.2d 958 (3rd Cir. 1988). The rule in this Circuit is that although a party may appeal an order denying a jury trial, he does not waive his jury trial right by waiting instead of taking an immediate appeal. *E.E.O.C. v. Corry Jamestown Corp., 719* F.2d 1219 (3rd Cir. 1983). *See also* Wright, Miller & Kane, *Federal Practice & Procedure* §2962 ("upon an appeal from the final decree, every interlocutory affecting the rights of the parties is subject to review in the appellate court")

The order forcing Newman to stipulate that Consol could litigate the Jones Act and unseaworthiness case in the limitation forum was dated January 29, 1991, more than a year and one

half before the decision in *Gorman v. Cerasia, supra*, of August 16, 1993, which was long after the thirty day appeal period and. [sic] The order was erroneous, pursuant to *Gorman,* and violated Newman's rights under the saving to suitors clause, the Seventh Amendment, the Jones Act and maritime law. However, Mr. Newman had no choice but to sign on the dotted line.

Supreme Court, U.S.
FILED
MAR 6 1998
CLERK

(3)

No. 97-1234

In The

Supreme Court of the United States

October Term, 1997

GEORGE NEWMAN,

Petitioner,

v.

CONSOLIDATION COAL COMPANY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The courts of appeals have sharply divided on whether a district court may condition a maritime personal injury plaintiff's right to try a negligence claim against a shipowner before a state jury on a stipulation disavowing all res judicata effects for those proceedings. Respondent has acknowledged this split, Op. Cert. 10 n.3, and impliedly recognized the importance of the issue for admiralty practice.

Respondent insists, however, that Newman voluntarily accepted[1] the stipulation imposed upon him by the district court, Pet. App. 45a, and he cannot now complain of the deprivation of his rights under the Seventh Amendment, savings to suitors clause, and Jones Act. That is precisely the point of this Petition: whether it was in the power of the district court to dictate a stipulation that rendered nugatory the effect of all subsequent state proceedings.

Respondent's argument is a "heads we win, tails you lose" proposition: maritime plaintiffs may not seek favorable res judicata effects from the state proceedings to which they are entitled. But, if the plaintiffs lose on their substantive negligence claims in state court, the shipowner may exploit that outcome. Respondent urges that if a plaintiff is unhappy

[1] It was Respondent that urged the stipulation against res judicata cover *all* issues to be litigated in state court, not just those bearing on the shipowner's right to limit liability. Op. Cert. 14a-15a. Immediately after Consol filed its Response and Objection to Newman's Motion to Vacate or Dissolve Injunction and to Stay, Op. Cert. 4a, the district court issued an order to that effect. Newman had no opportunity to object, even assuming such an exception would have been in order.

with a stipulation imposed by the district court, she may immediately appeal. But, in such a posture, an appellate court may well abstain until such time as a state court has passed on the underlying merits of the plaintiff's negligence claim against a shipowner. *See, e.g., Complaint of McCarthy Bros./Clark Bridge*, 83 F.3d 821, 830-31 (7th Cir.), cert. denied, 117 S.Ct. 361 (1996). But then, according to the Third Circuit and the Respondent, it is too late -- a challenge to the district court's original imposition of the stipulation cannot be maintained. Under Respondent's theory, this issue will persistently evade review.

The posture of this case is typical, if not paradigmatic, for those presenting this important point. Demanding that a maritime personal injury plaintiff seek what would otherwise be a permissive interlocutory appeal of a district court's imposition of a stipulation, or require that additional exceptions be taken (which are, in any event, disclaimed under Fed. R. Civ. P. 46), would be contrary to sound principles of appellate practice and judicial economy. It is precisely because this Petition now comes after the state and federal proceedings have fully run their course, that the concerns it raises are clearly revealed: the proper allocation of authority between state and federal courts in claims brought against shipowners.

CONCLUSION

For the foregoing reasons, along with those earlier presented, the Petition should be GRANTED.

Respectfully submitted,

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